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POLICE POWERS

ARISING UNDER

The Law of Overruling Necessity.

BY

W. P. PRENTICE,

COUNSELLOR AT LAW.

BANKS & BROTHERS,
NEW YORK. ALBANY.

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P R E F A C E .

Police powers arising under the law of overruling necessity are no new topic in any practical administration of sovereign authority. "For the commonwealth a man shall suffer damage as for the saving of a city or town," as an old case has it, and when we raise "bulwarks for the defense of the realm, every subject hath a benefit by it." Such bulwarks are raised by the police laws, but often the line of their defenses is met before the subject is aware of them, or recognizes the dangers to be faced.

— Special instances appear on many sides, and within the last few years they have had an extraordinary growth in frequency and number, they have been set out in many new laws, illustrated by numerous — decisions, and have become increasingly difficult to group, and to follow, except as we have the aid of some connected study of them, and an inquiry through the adjudications which distinguish their sources, connections, and principles, and afford rules for guidance and observation.

Such is the object proposed in this work ; to examine and report the facts as we have them at the present day, and to present them in a useful and serviceable form, in the hope that it may be of some benefit to others engaged in like research, and at least lighten the labor of searching through many reports for isolated precedents of cases, new only in the form or manner of occurrence, to any one interested in them.

W. P. P.

NEW YORK, *March* 9, 1894.

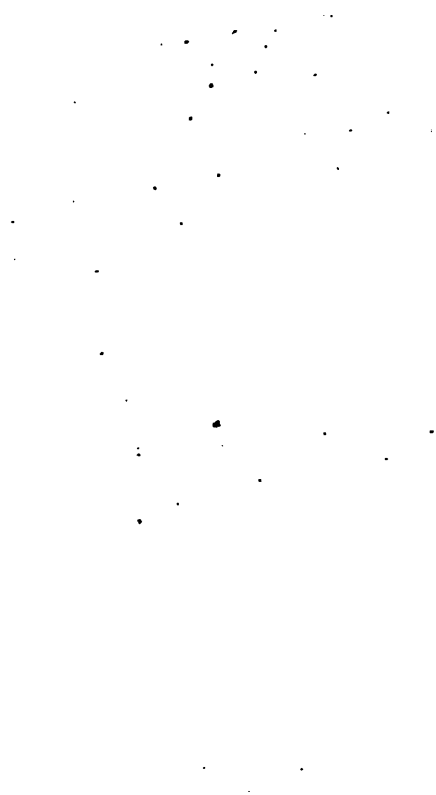


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POLICE POWERS.

INTRODUCTION.

The police power inherent in every sovereignty, for the protection of the public welfare, is difficult of exact definition. It has been well said that "it is easier to perceive and realize the existence of this power than to mark its boundaries or to prescribe limits to its exercise."¹ Followed through the decisions of the courts, police powers are seen to have wide extension and diversity. They are to be distinguished from those of the criminal administration. Belonging we may almost say to the equity side of government, they are entirely apart from the subjects of police regulations, or the police authority, as commonly designated, save in their origin. They also arise under what has been termed "the law of overruling necessity."

The great number of interests now reached and limited, and the paramount importance of some of the decisions under this head, arrest attention, and we look to some analysis, classification, and division of the subject to which cases may be referred, and by which we may trace some rule of guidance, whenever the exigency occurs upon which light is sought. Citizens' rights or property, as they are frequently estimated by the public, are continually invaded anew by government in its necessary guardianship of public interests and for the public good.

In our own land the situation is peculiar, where the States hold reserved powers, and the general government has but few of the inherent rights of sovereignty² from which come many of the local laws. On

¹ Chief Justice Shaw in *Com. v. Alger*, 7 Cush. 53; also, Mr. Justice Gray, in *Leisy v. Hardin*, 135 U. S. 100.

² *Holmes v. Jennison*, 14 Pet. 649; *Henderson v. Mayor, etc.*, 93 U. S. 259; *Railroad v. Husen*, 95 U. S. 485; *People v. Budd*, 117 N. Y. 12, 13; *id.* 143 U. S. 517;

the other hand, these very powers again are limited, by those expressly granted under the Constitution to Congress, as for instance, special health, harbor, or inspection laws may be in conflict with general laws regulating commerce.

Few writers have traversed this field of inquiry, and except in isolated cases, or in learned opinions of the courts, illustrating some principle invoked to solve intricacies in the controversy before them, the practitioner or the citizen has little aid from references or authorities. It is an interesting task to bring them together in any form for practical use, and none of the accepted treatises on special or kindred topics, belonging to the same great division of government for the preservation of peace and civic welfare, fail to throw additional light upon it, and to be of service.¹

The grouping of subjects, and cases applicable, may appear accidental, or more or less artificial. Their history was not dissimilar, drawn as they were into observation by some necessity, in the day-by-day experience of men in communal life. Approached from a different point of view, a more rigid and theoretical treatment would be expected. It is, however, of less importance to the worker, to consider under what head of government, the law of bailments, extended and diversified by the common law, or domestic relations, or the title of master and servant, may appropriately come, when all of them may be accepted as incorporated in the body of our jurisprudence, than to see how new subjects are bound together under police powers and laws. Public use and public interest make organized society a party in elevator business and contracts. Railroad agreements, even with trainmen, are under government supervision. Marriage, procured by brokerage, passes the censorship of the courts. Water-works trials involve large questions of public policy, and sovereignty itself is determined in county-seat or lake-front cases, or those involving prior grants within the harbor lines of a city.

Duval v. Wellman, 124 N. Y. 156; *Late Cor. of the Church of J. C., of Latter-Day Saints v. U. S.*, 136 U. S. 68; *Ill. C. R. R. v. People of Illinois and the City of Chicago*, 146 U. S. 387. Compared with Great Britain we have written constitutions while there "Parliament is absolute and without control." 1 Bl. Com. 160; 4 Co. Inst. 36.

¹ No student can ignore the importance and authority of Professor Tiedeman's work on *Limitations of Police Power*, and Wood on *Nuisances* in its several editions. Since this paragraph was written, there has been published by Mr. Bender, "The Law of Public Health and Safety," by Messrs. Parker and Worthington, a useful book.

Even the right of taxation for city improvements is in the Supreme Court of the United States, and the appeal from an assessment brings forth important rules depending on the construction of a sewer. It is by police power, the decision informs us, "for the health and cleanliness of the city," and this "police power is to be exercised solely at the legislative will," but as to the portion of its burden to be borne by "a taxpayer he has the right to be heard. No notice or assent from him was necessary, and notice to him by publication is sufficient."

In contrast we see the *cy pres* power of administering charities of a public nature assumed by the government, although in many of the States it has been held not to exist; a territorial power of church government set aside, and the right of the national legislature affirmed as *parens patriæ* to divert property from an unlawful use in aid of a false belief and appropriate it to the common schools.

Thus we shall observe that points of departure seemingly distant become connected by convenient channels of research for our study of the manifestations of police powers.

The most complete illustration of these police powers is to be found under the system of health laws, founded and administered as an independent part of municipal government.

Closely allied, imperious, and oftentimes appearing arbitrary, but irresistible if sustained by reason and the courts, these powers are first to be considered in their origin and development in any regular or scientific discussion of the subject.

¹ *Paulsen v. City of Portland*, 149 U. S. 80; *Church v. U. S.*, 136 U. S. 68; *Holland v. Alcock*, 108 N. Y. 312, 336.

CHAPTER I.

ORIGIN AND DEVELOPMENT OF POLICE POWERS.

Police powers have their origin in the law of necessity. Blackstone in his Commentaries construes the law of necessity as that of self-defense,¹ and does not apply it strictly to the idea of government; but later in his work he enumerates "offenses against the public health" and the public police or economy, which we distribute more accurately under the head of police powers." Chancellor Kent more carefully distinguishes "Cases of urgent necessity" in which no action lay at common law by the individual who sustained injury, as in the instance mentioned, where houses are razed to the ground, to prevent the spread of a conflagration.² "There exists a power," says Dwarria,³ "by which private property may be taken, used, or destroyed for the benefit of others, and this is called the police power, sometimes called the law of *overruling necessity*. It is clear that before the adoption of the Constitution⁴ it was well settled at common law that in cases of actual necessity, as that of preventing the spread of fire, the ravages of pestilence or any other great calamity the private property of the individual may be lawfully taken, used or destroyed for the relief, protection, or safety of the many." It is not singular that an analogy to the law of self-defense should have been thus early suggested, but the distinction is obvious, when we consider the plea of self-defense is founded upon a right, belonging to the individual by the law of nature, to repel violence against his person, and a concession to him, under certain limitations, by the public authority. In our subject, however, the act is that of the government for the defense of society, or the people whose peace is invaded by any violence.

¹ Bl. Com. IV, 30.

² Bl. Com. IV, chap. 18, 161.

³ 2 Kent Com. 338.

⁴ Potter's Dwarria, chap. XIV.

⁵ Potter's Dwarria, 444-5: "The maxim *salus populi est suprema lex*" applies, 11 Coke, 18.

Again, a certain resemblance has been found to the law of eminent domain, and this the more because in the case of buildings torn down in the path of a fire, compensation has sometimes been provided, by statute, for the owners of the property destroyed. A law of New York State applicable to the city of New York gave power to the mayor or recorder of the city, with the consent and concurrence of two aldermen, to direct a building¹ "hazardous and likely to take fire or to convey fire to other buildings to be pulled down and destroyed," providing thereafter for the assessment of damages by a jury, to be confirmed by the Mayor's Court, and the amount to be paid "in full satisfaction of all demands, of all parties having any estate or interests in the buildings destroyed." Cases arising under this act were very largely discussed upon the doctrine of eminent domain, in the courts of New York,² and with reference to English authorities, although the error had been clearly pointed out by several of the judges in the courts of first instance.

The decision adverse to the claims³ was sustained upon the ground that "the property was not taken for public use, but it was destroyed to prevent the spreading of a conflagration, and thus saving the property of other persons in the immediate neighborhood. It was taken for private use. Nine-tenths of the city had little or no interest in the question," says the court. The benefit was considered local and not a benefit to the city — the defendant. The law of eminent domain is too widely extended to be discussed here, but in brief it may be said to have no real relation to the police law of which we treat. It does not even rest upon the basis of necessary action, but on the domination of the public use and benefit over private interests.⁴ For the public benefit obtained just compensation is to be made, but there is no benefit to be recovered for by common law when property is necessarily destroyed.

¹ This provision of law now exists. N. Y. City Cons. Act of 1882, § 450.

² See *Russell v. Mayor, etc.*, 2 Den. 461; *Stone v. Mayor, etc.*, 25 Wend. 157; *Lyon v. Jerome*, 15 Wend. 574; see, also, *Mass. Stat.*; *Taylor v. Plymouth*, 8 Metc. 462; *Parsons v. Pettengill*, 11 Allen, 567.

³ Opinion of Judge Bronson, 2 Den. 464, 491; see *Mugler v. Kansas*, 125 U. S. 623; *Mills Em. Dom.*, § 4; *Scoville v. McMahon*, 26 Atl. Rep. 470; 62 Conn. 378.

⁴ Cf. *Monongahela Navigation Co. v. U. S.*, 148 U. S. 312; *Cavanagh v. Durgin*, 156 Mass. 466; *Boston v. Brookline*, 156 Mass. 172; *Kellogg v. City of New Britain*, 62 Conn. 232; *Sargent v. City of New Haven*, 62 Conn. 510; *Railroad Co. v. Perkins*, 49 Ohio, 326.

This police power or the law of overruling necessity is not controlled by the constitutional limitation that private property shall not be taken for public use without compensation, which was not designed for, and should not be extended to such cases. Our highest courts have said that society could not safely surrender the power to regulate by law certain business and trades, quoting the opinion of Lord Hale,¹ that private property affected with a public interest ceases to be *juris privati* only. The law of necessity has been stated to be an exception to all human ordinances and constitutions,² yet has been frequently decided to be subject to the law of reason and subject to the control of the courts. "*Multa autem jure civili contra rationem disputandi pro utilitate communi recepta esse innumerabilibus rebus probari potest*" was a statement of the civil law.

"The generality of the terms employed by jurists and publicists in defining this power, while they show the breadth and universality of its presence, nevertheless leave its boundaries and limitations indefinite and impose upon the court the necessity and duty, as each case is presented, to determine its appropriate limits," was the remark of Mr. Justice Andrews in the opinion of the Court of Appeals in *People v. Budd*,³ quoting Chief Justice Shaw in *Commonwealth v. Alger*,⁴ and at the close of this most important of the recent cases under this title extending the law to a comparatively new subject, viz., the charges of grain elevators, the court says: "The moment the police power is destroyed or curbed by fixed and rigid rules, a danger is introduced into our system."

Police powers are inherent in every sovereignty.⁵ "The very existence of government presupposes the right of the sovereign power to prescribe regulations demanded by the general welfare for the common protection of all." Mr. Justice Andrews says in the case above

¹ De Portibus Maris, 1 Harg. L. T. 78; Puffendorf, B. 2, chap. 6.

² Puchta Pandekten, I., § 21, 35. In f. d. ad. Leg. Aquil, 9. 2, III Blackstone Com. 74, quotes opinion in reference to proceedings against Sir Edward Coke for his course in the actions brought against the commissioners of sewers. "The pretense for arbitrary measures was the necessity of unlimited powers in works of evident utility to the people. The supreme reason above all reasons which is the salvation of the king's lands and people. But now it is clearly held that this is subject to the discretionary coercion of His Majesty's Court of King's Bench." 1 Ventr. 66; Salk. 146.

³ 117 N. Y. at p. 15.

⁴ 7 Cush. 58.

⁵ *Munn v. Illinois*, 94 U. S. 118; *People v. Budd*, 117 N. Y. at p. 29; *People v. Budd*, U. S. Sup. Court, 148 U. S. 517, and cases cited; *People v. King*, 110 N. Y. 48.

cited, and the statement of Chief Justice Taney in the *License cases*¹ has been often quoted, that this power of government, inherent in every sovereignty, the power to govern men and things, is not an uncontrollable or despotic authority, subject to no limitation exercisable with or without reason in the discretion or at the whim of the legislative body. But within its legitimate domain the power is original, absolute and indefeasible. The same idea was expressed by Lord Kenyon in *Rorke v. Dayrell*,² that the prerogatives of the crown are not given for the personal advantage of the king, but they are allowed to exist because they are beneficial to the subject, and Chitty says: "The splendor, rights and power of the crown were attached to it for the benefit of the people and not for the private gratification of the sovereign." The object of government and law is the welfare of the people. It is not, however, the welfare of the individual, but that of society, which is the first object of the law.³ In the progress of civilization, and as the larger limits for the necessary exercise of police powers are recognized, as new occasions and new demands arise, the legal relations of the citizens are more and more perfectly defined and limited by public statutes,⁴ and less difficulty will be found in any exigency for its determination under the appropriate law and authority. Wherever there is the legislative power, laws under this head will be enacted and made effective under the larger or more local jurisdictions in which the powers are for this instance vested.

¹ 5 How. 583; *Mugler v. Kansas*, 123 U. S. 628

² 4 T. R. 410.

³ On Prerogatives, 4.

⁴ Puchta Pandekten, § 21.

⁵ The numerous decisions under the Interstate Commerce Law illustrated this rule. Of recent legislation we have examples in the Car-coupling Law of Congress, 1898, and in many of the States prohibitory laws against cigarette smoking in public places or by youths. An appropriation for the State exhibit at the World's fair was held within the public powers of the legislature in *Norman v. Kentucky Bd. Man. W. C. Expos.*, 20 S. W. R. 901; *People v. Cannon*, 54 N. Y. St. R. 431; *U. S. v. World Col. Ex.*, 56 Fed. R. 680; *id.* 1654; *Marezoll Institution*, § 4. "Das positive recht und seine entstehung durch publicirte gesetze oder durch rechts gewohnheiten." "The consuetudines mentioned so constantly in the charters of the boroughs were the ordinary or customary laws which had existed in them immemorially and were amended from time to time as by-laws; nor is it clear that the customary law had not a position in the Constitution strong enough to resist, and even as in the case of weights and measures, successfully to defy statutory enactments! Select charters (Stubbs' 7th ed.), pp. 110-111, s. v. Customs of New Castle; see Co. Litt. 110. 6, § 165.

Early examples of sanitary laws are mentioned, as *e. g.* An act of 1388 in England,¹ imposing a penalty of £20 on any person who cast animal filth or refuse into rivers and ditches. An act of 1489 prohibited the slaughtering of cattle within cities. Dwarria cites other instances of the use of these powers in former times for the public benefit, which is held to be the test of the authority. Thus in an old case in 12 Co. 13,² it was held that the king could not take private property for a wall about his own house, for this was not a public benefit, but much of our sanitary legislation, not only in England and the United States but in the world, dates from this century. "From time immemorial in England," says the court in *Munn v. Illinois*,³ and in this country from its colonization it has been customary "to regulate ferries, common carriers, hackmen, brokers, millers, wharfingers, innkeepers, etc." In *Aldnutt v. Inglis*, rates for storage of wines in the London docks in 1810,⁴ were limited to a reasonable compensation, and Congress as early as 1820 conferred powers upon the city of Washington⁵ to regulate rates of wharfage, of chimney-sweeps, of cattlemen, hackmen, carmen and auctioneers.

Later, health laws in the different States, and statutes governing car companies, telephone companies, electric-light companies, elevators and other business in which there is a public interest to be protected, have greatly extended the sphere, limits and force of police powers. Taking their rise from sources of common danger, they have reached the protection of the lives, limbs, health, comfort, morals and quiet of all persons and the protection of all property in the State.⁶ The introduction of game during certain months,⁷ the sale of illuminating oil below a certain standard, and the unregulated use of explosives and dangerous substances,⁸ may be prohibited in a State, and quarantine laws enforced in new directions.⁹ Such has been the development of police powers,

¹ Sanitary Legislation, D. B. Eaton, 1872.

² Potter's Dwarria, 445, note 2.

³ 94 U. S. 113-136.

⁴ Id. 127.

⁵ Id. 125.

⁶ Slaughter-house cases, 16 Wall. 36.

⁷ Phelps v. Racey, 60 N. Y. 10; State v. Randolph, 1 Mo. App. 18.

⁸ U. S. v. DeWitt, 9 Wall. 41.

⁹ Compulsory vaccination has been instituted in many countries. In Austria a new and more vigorous measure is now proposed. In England, a committee of Parliament has recently reported on the Eastbourne Improvement Bill, wherein, by the 149th clause, power has been given to the local authorities to forbid processions of the Sal-

not dreamed of when their aid was first invoked. The progress of civilization, and the requirements of more perfect government for the public welfare, have sustained and increased them in number certainly, if not in the imperial force they oftentimes assume. The limits are not yet reached while we still advance, but the underlying principles by which the reason or unreason, or the constitutional limits of the authority claimed or used, may be investigated or judged, are now fortunately less obscure, and in the majority of cases they have become fixed, and have been illustrated in many decisions of our highest courts.

vation Army. Such an ordinance directed against noisy processions of certain classes was declared unconstitutional by Supreme Court of Wisconsin, April, 1898. *In re Garrabod*, 54 N. W. R. 1104.

CHAPTER II.

DIVISION AND CLASSIFICATION.

A convenient division of laws is as to their subjects. These naturally fall under various heads, and the test of legislative power, to be applied under our written constitutions, varies from that of the British Parliament. The first questions arise concerning limitations, certain powers having been granted to the national government and taken from the States. Thus it is with the regulation of commerce, both foreign and interstate. This includes immigration, and with it are necessarily bound, more or less exclusively, other subjects, to which, however, within State limits, in so far as purely local interests are affected, the reserved powers of the States apply. Generally speaking, what is not covered expressly, or by necessary implication to secure the grant, in the Constitution, is reserved to the States. In one case the letter and spirit of the Constitution, strictly construed, prevails; in the other, all the reserved powers of local administration remain, to be exercised for the welfare of the people of each State separately under its own Constitution. Police powers in the national administration are limited, but in the States they extend and progress in every direction within no well-defined bounds, subject principally to the wisdom of the legislature, and the will of the people, as they find expression under constitutional forms, and in the laws. The regulation of commerce and, as a part of it, the regulation of immigration, is not through the police power, yet police powers may reach to the immigrants. How far the States can by appropriate legislation protect themselves against the introduction of actual paupers, vagrants, criminals, and diseased persons has not been definitely settled.

Such a right can only arise from a vital necessity¹ for its exercise,

¹ *Pierce v. New Hampshire*, 5 How. 514; *Leisy v. Hardin*, 135 U. S. 100; *Bowman v. R. R. Co.*, 125 U. S. 465; *Minn., St. P. & S. S. M. R. Co. v. Milner*, 57 Fed. R. 276.

² *Henderson v. Mayor*, 92 U. S. at p. 274; *Chy Lung v. Freeman et al.*, 92 U. S. 275; *People v. Comp. Gen. Transatlantique*, 107 U. S. 59.

and cannot be carried beyond the scope of that necessity. Quarantine established by a State is a rightful exercise of the police power for the protection of health, not forbidden by the Constitution, and although some of the rules¹ established may amount to regulations of commerce with foreign nations, such regulations are incidental and are valid, where the subject is not one "of which there can be of necessity only one system or plan of regulation for the whole country." Congress has in certain legislation adopted the State laws² and forbidden interference; or provided that designated subjects of commerce shall be subject to the laws of a State or Territory enacted in the exercise of its police powers. When the subject upon which Congress can act under its commercial power, is local in its nature or sphere of operation, such as harbor pilotage or improvement of harbors,³ establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers and docks which can be properly regulated only by special provisions adapted to their localities, the State can⁴ act until Congress interferes and supersedes its authority. Powers relating to municipal regulations are not surrendered by the States.⁵ They are, as subjects of legislation, of primary importance. If the right to control these subjects be complete, unqualified and exclusive in the State legislatures, no regulations of secondary importance can supersede them.

Articles in such a condition as tend to spread disease are not merchantable⁶ or legitimate subjects of trade and commerce, and the self-

¹ *Morgan S. S. Co. v. Louisiana*, 118 U. S. 455; approved, 121 U. S. 448. See as to limitations of the rule of *Pierce v. New Hampshire* and the distinction as to subjects, *Leisy v. Hardin*, 135 U. S. 100, and a later discussion of these cases in *Commonwealth v. Huntley*, Mass. Sup. Court, May 7, 1892, 156 Mass. 236; *Sherlock v. Alling*, 93 U. S. 99; *Waterbury v. Newton*, 50 N. J. L. 584; *Vannini v. Paine*, 1 Harr. (Del.) 65; see also Act of Congress of August 8, 1890, and *Wilkerson v. Rahrer*, 140 U. S. 545.

² U. S. R. S., § 4792, act of April 29, 1878, chap. 66, An act to prevent the introduction of infectious and contagious diseases into the United States.

³ *Ouachita Packet Co. v. Aiken*, 121 U. S. 448, and cases cited.

⁴ *Bowman v. Chicago & N. W. R. R.*, 125 U. S. 465; *Cooley v. Port Wardens of Philadelphia*, 12 How. 299.

⁵ See *Pierce v. New Hampshire*, 5 How. 514, and dissenting opinion in *Leisy v. Hardin*, 135 U. S. 144.

⁶ Opinion of the court, *Leisy v. Hardin*, 135 U. S. 100. Opinion of Catron, J., *License cases*, 5 How. 599; see also 125 U. S. 489; 135 U. S. 108; 140 U. S. 545-557.

protecting power of each State, therefore, may rightfully be exerted against their introduction. Such an exercise of power cannot be considered a regulation of commerce prohibited by the Constitution. Congress has power to divest subjects of interstate commerce of that character and leave them subject to State legislation. Intoxicating liquors transported into the State of Kansas and there sold after the passage of the act of Congress of August 8, 1890, are subject to the existing laws of the State as to the sale of such liquors. In this act Congress has not attempted to delegate power to regulate commerce nor to exercise any power reserved to the States.¹ The subjects of legislation, therefore, arising from necessity and for the welfare of the people will be found in laws of Congress, in laws of the States and in municipal laws and ordinances.

A municipal ordinance² prohibiting washing and ironing in public laundries and wash-houses within defined territorial limits, from ten o'clock at night until six o'clock in the morning, is a purely police regulation, within the competency of a municipality, possessed of the ordinary powers. Powers of such legislation have been frequently granted in charters of cities and sustained.

Laws are general or special, and this division distinguishes them in every jurisdiction. They may be for the protection of the whole country, or for certain classes, or be confined to State or municipal limits, and affect all, or only classes within such limits. Any nation may regulate commerce and immigration to protect its people, and the courts have not to decide upon treaty obligations³ in such legislation. In any conflict between an act of Congress and a treaty with a foreign power, the act of Congress must prevail, and the courts have not to inquire into the motives of the legislators in an enactment, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country, and existing legislation. They will always be presumed⁴ to accomplish that which follows as the natural and reasonable effect of their enactment.

¹ *Wilkerson v. Rahrer*, 140 U. S. 545.

² *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 708; and *Polinsky v. People*, 73 N. Y. 65.

³ *Cherokee Tobacco*, 11 Wall. 616; *United States v. McBratney*, 104 U. S. 621-623; *Taylor v. Morton*, 2 Curtis, 454; *Ah Lung*, 18 Fed. R. 28.

⁴ *Soon Hing v. Crowley*, 113 U. S. 710-11; *Transportation Co. v. Parkersburg*, 107 U. S. 698.

The general government may prohibit entry into the land, of improper, dangerous diseased animals or men, paupers, convicts, vagrants, and persons under unlawful or immoral contracts. Certain classes of laborers, and Chinese and Cooley laborers may be excluded.¹

Several nations, among them the United States, have taken special precautions, both in the importation and exportation of articles of food, and particularly to prohibit trichina pork.² So also vines exposed to danger from phyloxera, or wheat smitten with the Hessian fly, may be condemned.

The United States government has extended its police legislation in a number of instances, as in the law against trusts and monopolies, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and in the acts in regard to lotteries, refusing the facilities of the mails to the distribution of circulars and advertisements deemed injurious to the public morals. In interstate commerce the government exercises this inherent power for protection, through the Department of Agriculture, and the Bureau of Animal Industry. Agents and methods are employed to examine, quarantine and destroy animals, and to extirpate pleuro-pneumonia.³

In such efforts the aid of the States and Territories is invited, but the general government proceeds to original action. Further acts regulate the safe and humane treatment of animals in transportation.⁴

"It is conceded," says Mr. Justice Woodbury in the License cases⁵ decided by the United States Supreme Court in 1846, "that the States may exclude pestilence, either to the body or mind, shut out the plague or cholera, and no less, obscene paintings, lottery tickets and convicts. The list of interdicted articles and persons is a long one in most European governments, and though in some cases not very judicious or

¹ Act of March 3, 1875, chap. 141; 18 Stat. L. 477; U. S. R. S., §§ 2158, 2163, 4272; 125 U. S. 489; Act of May 5, 1892; 56 Fed. R. 81; Act of May 6, 1888, chap. 126; 23 Stat. L. 58; Act of July 5, 1884; 23 Stat. L. 115; Act of May 6, 1882, chap. 126; 25 Stat. L. 504.

² Act of Aug. 30, 1890, chap. 839; 26 Stat. L. 414.

³ 25 U. S. Stat., chap. 647, p. 209; U. S. Rev. Stat., § 3894; Act of Sept. 19, 1890; *Ex parte Rapier*, 148 U. S. 110; *Horner v. United States*, 148 U. S. 126, 266; Act of May 29, 1884, chap. 60; 23 Stat. L. 81.

⁴ Act of March 3, 1891; 26 Stat. L. 833, 1089.

⁵ 5 How. 628; see 125 U. S. 492; *Waterbury v. Newton*, 50 N. J. L. 534; *Patterson v. Kentucky*, 97 U. S. 501; *Jordan v. Overseers of Dayton*, 4 Ohio, 295; *Vannini v. Paine*, 1 Harr. 65; *Crutcher v. Kentucky*, 141 U. S. 47. Opinion of Marshall, Ch. J., in *Brown v. State of Maryland*, 12 Wheat. 444.

liberal, is in others most commendable, and the exclusion of opium from China is an instance well known in Asia and kindred in its policy. The introduction and storage of gunpowder is one of those articles long regulated and forbidden here. Lottery tickets and indecent prints are also a common subject of prohibition almost everywhere. And why not cards, dice and other instruments of gaming, when thought necessary to suppress that vice. In short, upon what principle but this rests the justification of the States to prohibit gaming itself, wagers, champerty, forestalling, not to speak of the debatable cases of usury, marriage brokerage bonds, and many other matters deemed either impolitic or criminal."

Local administrations may take preventive measures against dangers from persons, animals and things so far as their own territory is concerned. The limitations upon the exercise of this power, where interests in the exclusive charge of the general government are concerned, speedily reach a point where, as was very forcibly said by Mr. Justice Grier¹ in *Pierce v. New Hampshire*, "the powers which relate to merely municipal regulations or what may more properly be called internal police, are not surrendered by the States or restrained by the Constitution of the United States, and that consequently, in relation to these, the authority of the State is complete, unqualified and conclusive. As subjects of legislation they are, from their very nature, of primary importance; they lie at the foundation of social existence. The exigencies of the social compact require that such laws be executed before and above all others. There is no conflict of power or of legislation as between the States and the United States. Each is acting within its sphere and for the public good."

These powers resident in the States have descended by express enactments to municipal governments, and to separate departments thereof, as to the health department of the city of New York, and the highest court of the State has said that an ordinance enacted by the board of health, to prevent the bringing into the city and the sale of adulterated milk, which is additional² to and embraces an offense not provided for

¹ 5 How. 632; 127 U. S. 678; 125 U. S. 465; 97 U. S. 501; *Com. v. Waite*, 11 Allen, 264; *Com. v. Holt*, 146 Mass. 38; see *id.* 159, 512; *State v. Campbell*, 64 N. H. 402; *State v. Smith*, 14 R. I. 100; *People v. West*, 106 N. Y. 293; see, also, *Leisy v. Hardin*, opinion of Mr. Justice Gray, 135 U. S. 100.

² *Polinsky v. People*, 78 N. Y. 65; *Com. v. Cutter*, 156 Mass. 52; *Com. v. Abrahama*, 156 Mass. 57; *Alliance v. Joyce*, 49 Ohio, 7; *City of Vincennes v. Citizens' Co.*, 123 Ind. 114; see, also, 95 Mich. 169, 551; 62 Conn. 112.

in the State laws, is valid, and within the scope of sanitary legislation. Nor are the powers of municipal governments limited to the exact terms of express laws. A certain inherent power of protection must still remain. It is within the ordinary powers of a city government, says the court in *Mr. Justice Field's* opinion in *Barbier v. Connolly and Soon Hing v. Crowley*,¹ to make and enforce an ordinance such as that of the city of San Francisco, regulating laundries and wash-houses within certain territorial limits. If within the sphere of its operation it affects alike all persons similarly situated, it is not within the constitutional objection. It is no objection to a municipal ordinance prohibiting one kind of business within certain hours that it permits other and different kinds of business to be done within those hours." It is not even discriminating legislation in any invidious sense if branches of the same business from which danger is apprehended are prohibited during certain hours of the night, and other branches, involving no such dangers, are permitted. The same authority which directs the cessation of labor, must necessarily prescribe the limits within which it shall be enforced, as it does the limits in a city where wooden buildings cannot be constructed."

In like manner a statute of Alabama, declaring it unlawful within certain counties to transport or move after sunset, and before sunrise of the succeeding day, any cotton seed, but permitting the owner or purchaser to remove it from the field to a place of storage, was held, by the courts of that State, constitutional, and the decision² is cited with approval by the U. S. Supreme Court. It was held to be "a mere police regulation to regulate traffic in the staple agricultural product of the State so as to prevent a prevalent evil, which, in the opinion of the law-making power, might do much to demoralize agricultural labor, and destroy the legitimate profits of agricultural pursuits to the public detriment, at least within the specific territory."

All rights have been held subject to the police power of a State, and if the public safety or public morals require the discontinuance³ of any

¹ 113 U. S. R. 708; *Barbier v. Connolly*, 113 U. S. 27, 32; *Powell v. Penn.*, 127 U. S. 678; *Minn. & St. Louis R. R. v. Beckwith*, 129 U. S. 26.

² *Soon Hing v. Crowley*, 113 U. S. 708.

³ *Davis v. State*, 68 Ala. 58; *Budd v. The People, etc.*, 143 U. S. 517; see *Statute of New York State* prohibiting every person in charge of any vessel "to transport into the city of New York any Indian meal upon the deck of the vessel;" 1 R. S. 589, pt. I, tit. 2, § 23.

⁴ *Beer Company v. Massachusetts*, 97 U. S. 25; *Mugler v. Kansas*, 128 U. S. 623; *Powell v. Pennsylvania*, 128 U. S. 623; *People v. Budd*, 117 N. Y. 1.

manufacture or traffic, the legislature may provide for its discontinuance, notwithstanding individuals or corporations may, thereby, suffer inconvenience. The State cannot divest itself of the power to provide for the lives, health, morals and public interests of the citizens. So also all property is held¹ subject to the general police power of the State, to regulate or control its use to secure the general safety and the public welfare.

In whatever administration, the more general or local, whenever public regulation becomes necessary of any matter, business, use, employment, traffic or thing,² because a public interest is affected, or a common charge or burden created or a duty is imposed, and the private character or relations are so lost or modified as no longer to be *juris privati* only, but *pro utilitate communi*, of common and general concern, then a permanent and fixed rule is established, which may, however, be from time to time changed in the same manner as it was formed.

Many of these laws may be classed together, and of some it may be said, they have been so long recognized as a part of the law of the land, that they hardly require enumeration. In England and in this country, ferries, common carriers, hackmen, brokers, wharfingers, millers, innkeepers, auctioneers, even chimney sweeps have been under such recognized control, that precedents are at hand for every question of their conduct or reciprocal rights with the public administration, which may arise. In this class, to which constantly are being added other subjects, as for instance the relations of telephone and electric-light companies and elevators, the law or rule commands, restrains,

¹ *Bertholf v. O'Reilly*, 74 N. Y. 509; *People v. B. & A. R. R. Co.*, 70 N. Y. 569; *People v. West*, 106 N. Y. 293; *People v. King*, 110 N. Y. 418; *People ads. Budd*, U. S. Supreme Court, opinion of Blatchford, J., 143 U. S. 517.

² 3 W. and M., chap. 12, § 24; 8 Stat. at L. Great Britain, 481; N. J. Navigation Co. v. Merchants' Bank, 6 How. 382; *Mobile v. Yuille*, 3 Ala. (N. S.) 140; *Bolt v. Stennet*, 8 T. R. 606; *Allnutt v. Inglis*, 12 East, 527; *People v. B. & A. R. R.*, 70 N. Y. 569; *People v. King*, 110 N. Y. 418; *Buffalo E. S. R. R. v. Buffalo S. R. R. Co.*, 111 N. Y. 132; *Munn v. Illinois*, 94 U. S. 113; *Powell v. Pennsylvania*, 127 U. S. 678; *People v. Budd*, 117 N. Y. 1; 143 U. S. 517; *Spring Valley Water-Works v. Schottler*, 110 U. S. 347, 354; *Railway v. R. R.*, 30 Ohio St. 604; *State v. Gas Company*, 34 Ohio St. 572; *Ruggles v. People*, 91 Ill. 256; *Nash v. Page*, 80 Ky. 539; *Sawyer v. Davis*, 136 Mass. 239; *Brechbill v. Randall*, 102 Ind. 528; *Webster Telephone case*, 17 Neb. 126; *Hackett v. State*, 105 Ind. 250; Delaware, etc., R. R. Co. v. Central Stock Yard Co., 45 N. J. Eq. 50; *Davis v. State*, 68 Ala. 58; *Beer Company v. Massachusetts*, 97 U. S. 25; *Mugler v. Kansas*, 123 U. S. 623; *Kidd v. Pearson*, 123 U. S. 1; *Nashville, C. & St. L. R. R. v. State of Alabama*, 123 U. S. 96.

forbids, permits, or punishes,¹ and thus fixes the obligation, and to it the title of mandatory or restraining laws, may be given. Under such title may be classed most of the prohibitory legislation of the States, labor and factory laws, game laws,² the inspection and license laws which still remain on the statute books, port and wharf dues, and restrictions upon prices, weights, commissions and dues, when these do not more immediately fall under some other administrative form such as in the ordinary commercial regulations, or those designed principally to prevent fraud, or in trade-marks.

¹ *Legis virtus est imperare, vetare, permittere punire*, Modestinus, 7 D. 1, 8; *de legibus*.

² The game laws spoken of are the American game laws, not the English special and proprietary laws. During the colonial period, a great many articles were required to be inspected, and stamped or passed, generally for exportation. Many of these inspection laws have remained on the statute books of the different States until a late period and have been cited in notes to cases, as *e. g.*: *Gibbons v. Ogden*, 9 Wheat. 1; *Turner v. Maryland*, 107 U. S. note pp. 51, 52, 53, 54. They embraced in New Hampshire, casks of flaxseed. 1785. See *Perpetual Laws of New Hampshire*, 1789, p. 188, 193. Dimensions of shingles, staves and hoops and in other settlements and in the State, size of casks, inspections of beef, pork, fish and tobacco, liquor, flour, pot or pearl ashes, bricks, charcoal baskets, alewives, kegs for butter and lard, herring casks, turpentine barrels, tobacco hogsheads, packing of pot and pearl ashes, flour, pork, beef and to prevent exportation of unmerchantable flour or unsound salted provisions, etc. References may be had to R. S. Delaware, Virginia Public Statutes, Rhode Island R. S., Maine R. S., 1871; General Statutes, Massachusetts, 1860; Connecticut, 1875; Vermont, 1880; N. J. Revision, 1877; Georgia Code, 1867; Louisiana Digest S. vol. 11, 1870; Statutes of Wisconsin, Michigan, 1871; North and South Carolina; Statutes of Tennessee, 1871; Florida Digest, 1881; Mississippi Rev. Code, 1880, § 949; Ohio R. S. 1880, vol. 1, §§ 391, 4300, 4327, 4293, 4291, 4285, 4281; Maryland, 1787, 1792, chap. 65; 1797, chap. 7, 180, chap. 102, § 2 and note; 1811, chap. 69; 1821, chap. 77; 1 Md. Code, art. 96, § 20; Pennsylvania, *Brightly's Digest*, 1873, pp. 157, 158, 188, 189, 525, 708, 711.

Under U. S. R. S., § 4472, no loose hay, cotton or hemp, no camphene, explosive fluids or oils or like dangerous articles or acids or chemicals, can be carried in passenger steamers, except on the guards or in such safe place as may be prescribed by inspectors.

In New York State there were a multitude of such laws and carefully preserved in the revision of the statutes down to 1818. In the city of New York leaf tobacco was to be inspected, so also the tare in firkins and the packing and sale of pressed hay were regulated, but these inspections were abolished in 1843, chap. 202, and by the Constitution of 1846, art. V, § 8, except so far as necessary "for the purpose of protecting the public health or interests of the State in its property, revenue, tolls or purchases, or of supplying the people with correct standards of weights and measures." The sizes of barrels for different purposes are still regulated, 1 R. S. 542, 543. Marked bottles and barrels are protected, Penal Code, § 871; Laws 1864,

A State law disqualifying all persons afflicted with color blindness from serving on railroad lines within the State in certain capacities, fixing a penalty, requiring a re-examination every five years and that the fees be paid by the railroad companies, "is not directed against commerce, and only affects it incidentally, and is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water."¹

Numberless laws have been enacted governing railroads and their operations in many details, and in many of the States the public requirements are embodied in a general law. Special acts are adopted relating to rates of fare; the kind of service; the use of stoves in cars; and certain forms of signals; the maintenance of stations at certain points; even for the posting of the time of trains at different stations. New obligations resting upon electric power and light, use and distribution are in a similar category.

Power over railroads is asserted from two sources: Public policy and the conditions of their franchises made a part of their charters. The United States has also under the first head recently enacted the car-coupling law, providing for the necessary adoption of an uniform coupling, which will act automatically, and avoid the dangers of workmen having to go between cars, to fasten and unfasten the couplings. The companies have until 1895 to perfect such a device.

Labor, holiday, factory and education laws in some form, the so-called anti-truck laws to govern employment contracts as to the terms of payment, and the form and times in which payments for labor are to be made, fall under divisions of this subject.

Another subdivision will relate to measures appropriate and needful for the protection of the public morals, public health and public safety, in restraining the manufacture, use and sale of intoxicating liquors, or such products as oleomargarine, which are not *per se* noxious or un-

chap. 276; Laws 1886, chap. 417, and milk cans, Laws 1865, chap. 295; Laws 1887, chap. 401; see, also, Fish and Game Laws, and *Tinkham v. Tapscot*, 17 N. Y. 141; see *Millet v. People*, 117 Ill. 294; *Frorer v. People*, Ill. Sup. Ct., March 26, 1892, 141 Ill. 171.

¹ *Nashville, C. & St. L. R. R. v. State of Alabama*, 128 U. S. 96; *Sherlock v. Alling*, 93 U. S. 104; *Smith v. Alabama*, 124 U. S. 465; *Dow v. Beldelman*, 125 U. S. 880; U. S. Car-Coupling Law, March, 1893; Law of Indiana, of March 9, 1889, requiring time of trains to be posted at stations; *State v. Ind. & I. S. R. R.*, 82 N. E. R. 817.

healthful.¹ Prohibitory laws have been sustained when not in conflict with the constitutional powers of Congress regulating commerce. And again it is because of their necessary subjection to State police control for the public welfare that Congress in the act of August 8, 1890, divested intoxicating liquors transported into a State or Territory, from immunity through the interstate commerce laws, and restored the rule which formerly governed them. Novel procedure in some of the States has enforced the surrender to the local administration of the control of liquor traffic.

Other heads to be treated are: Quarantine and health laws, including inspection and disinfection regulations, and sanitary ordinances having the force of law in local districts.

Food adulterations, which present also features of fraud, besides those of the sanitary conditions and effect; laws for the protection of purity in water; laws preventive of dangers from inflammable oils and explosive substances. Vital statistics, in connection with the health administration, both in State and local jurisdictions, including reports of diseases, and regulations for transit and interment of dead bodies.

Offensive trades and nuisances, and the disposition of offal form a topic by themselves, and embrace many considerations, including those of the proceedings and remedies applicable.

Connected with the subject of remedies available in nuisance cases is also that of the accountability and responsibility for the exercise and use of police powers wherever vested or bestowed. Property rights and those of the use of real property for buildings, particularly in cities and crowded settlements, are subject to variations, dependent on locality, within fire limits or bordering upon streets, an alley or a boulevard, and are in a measure controlled so that the safety and welfare of the public may be guarded. Building laws are framed with reference to the strength and height of walls and safety from fire in construction, and the preservation of healthful conditions in height, ventilation, plumbing and the appurtenances.

Tenement and lodging-houses are classed by themselves, and there has grown up about them a body of law and ordinances which seem

¹ *Mugler v. Kansas*, 123 U. S. 623; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Powell v. Pennsylvania*, 127 U. S. 678; *Wilkerson v. Rahrer*, 140 U. S. 545; *Com. v. Huntley*, 156 Mass. 236; *Bartemeyer v. Iowa*, 18 Wall. 129; *Kidd v. Pearson*, 128 U. S. 1; *Bertholf v. O'Reilly*, 74 N. Y. 510.

to segregate them and their people apart from the house life of other citizens. Withal there is to be considered the limitation of police powers in a variety of ways, when in conflict with the superior authority of the general government, or constitutional rights and obligations which are not inferior to the necessity which has caused them to be asserted. They also have a limiting effect upon other rights and powers as for example we have seen in respect to property rights which may be subjected to building and fire laws, or again, on occasion, they may bar the way of commerce or immigration or trade.

Public policy is constantly manifested on subjects within the effect of these laws. Its obligations are to be considered in matter of contracts, and also in relation to labor, and to combinations and strikes. Licenses may be imposed, taxes laid, and, both directly and indirectly, occupations regulated. Moreover there has been a great advance particularly in our country in national police legislation on special subjects including the immigration laws, those relating to the Rinderpest and the Bureau of Animal Industry and embracing the regulation of the importation of aliens under contract to perform labor, the Chinese exclusion acts, and the national quarantine act of 1893.

Recent State legislation has not been behind in the demands made through State legislatures for new interference with private and corporate rights and obligations, occupations, and the use of real property under the name of greater protection of public interests. Such laws as the stock-killing acts, the South Carolina liquor law, the agency act in New York State, some limitations upon rights of voters in several of the States, and the watershed law in the State of New York, occasion litigation, invoke a new inquiry into the relations of subjects to modern governments, and lead finally to an elucidation of legal principles in the decisions of the courts, which are of immediate concern to every well-wisher to the institutions of his country, though he be affected only remotely by the operation of any of these laws. It is to guard a safe progress in meeting new needs of civilization in community life, neither halting nor hurrying recklessly, that we have provided written constitutions, and these, conservatively construed, as heretofore, afford us criteria to be depended upon in the matter of police laws.

CHAPTER III.

ADMINISTRATION—GENERAL. LOCAL.

The question of general or local administration as to the exercise of police powers does not depend upon territorial limits, nor upon the subject-matter. There may be an undoubted field for national action, and yet within it, local rights of self-protection remain. The phrase of concurrent jurisdiction has been discredited by the courts, but the same learned judge, who has so clearly stated the proposition, that where the United States government has provided a system as of quarantine under its power to regulate commerce, this must be exclusive, at least so far as other laws are inconsistent with it, has also said¹ that the State laws on this subject are valid, both because the act of 1879 and the Revised Statutes, title LVIII, clearly recognize the quarantine laws of the State, and because such laws belong to a class, with whatever intent they may be passed, "admitted to be valid until displaced or contravened by some legislation of Congress." He adds, "the practice which should control a quarantine station on the Mississippi river is widely different from that best for the harbor of New York." A clearer statement is found in Judge Bradley's opinion in *Crutcher v. The State of Kentucky*,² as follows: "It is also within the undoubted province of the State legislature to make regulations with regard to speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains, to bridges, tunnels, deep cuts, and sharp curves, and generally with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of State commerce. Such regulations are eminently local in their

¹ *Morgan v. Louisiana*, 118 U. S. 464; see opinion of Marshall, C. J., 9 Wheat. at p. 205, and opinion of Mr. Justice Catron, 5 How. at p. 606.

² *Crutcher v. State of Kentucky*, 141 U. S. 47; and see *Bowman v. Chicago & N. W. R. R.*, 125 U. S. 507.

character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections and unquestionably valid."

Chief Justice Marshall in *Gibbons v. Ogden*,¹ in giving judgment described the valid State laws, and added: "Inspection laws, quarantine laws, health laws of every description as well as those for regulating the internal commerce, and those in respect to turnpike roads are component parts of this mass. No direct general power over these subjects has been granted to Congress, and, consequently, they remain subject to State legislation. *If the legislative power of the Union can reach them it must be for national purposes.* It must be where the power is expressly given for a special purpose or is clearly incidental to some power which is expressly given."

The Supreme Court in *Sherlock v. Alling*,² held "that in conferring upon Congress the regulation of commerce, it was never intended to cut the State off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country." This does not conclude the question, for no State is compelled to admit dangerous articles or persons. If really in such condition they are not legitimate subjects of commerce³ as regulated by the *lex Mercatoria*. "Paupers, vagabonds and fugitives never have been subjects of rightful national intercourse" and they may be excluded is the opinion of Mr. Justice Wayne in the *Passenger cases*.⁴ "In short it cannot be doubted," says the U. S. Supreme Court in *Wilkerson v. Rahrer*,⁵ "that the power to make the ordinary regulations of police remains with the individual States and cannot be assumed by the national government. In so far this is a return to the doctrine of *Pierce v. New Hampshire*, that in respect to State or municipal regulations for the protection of a particular locality "they cannot be suspended or restrained by those of secondary importance on the ground of prerogative or supremacy." If the jurisdiction be not concurrent, as it is in criminal matters in all places within State limits ceded to the United States for government use, yet it is coterminous, and the local administration can protect its own territory by powers

¹ 9 Wheat. 203, 204; cited *Leisy v. Hardin*, 135 U. S. 100.

² 93 U. S. 99.

³ *Leisy v. Hardin*, 135 U. S. 100.

⁴ 7 How. 426.

⁵ 140 U. S. 545.

not surrendered to and exclusive in the general government.¹ There is no conflict. The one supplements the other. The instances are many. Rags may be brought in from an infected port and passed or refused by the custom authorities. In neither case can they be landed on a dock in the city of New York without a permit from the board of health. If in such a condition as tends to spread disease, they are not merchantable,² are not legitimate subjects of trade and commerce, and the self-protecting power of each State, therefore, may be rightfully exerted against their introduction. On the other hand, dangers occur from interstate commerce or from subjects in neighboring States spreading pestilence, it may be, beyond local control, where the national power will alone be adequate for protection; yet this also must stop when it reaches the streets, docks, houses, hospitals of a city, and the local administration prevails in purely local affairs. The distinction has been accurately drawn, that in so far as the subject-matter requires an uniform system as between the States or in foreign commerce³ "the power of controlling it is vested in Congress and cannot be encroached upon by the States; but where, in relation to the subject-matter, different rules may be suitable for different localities, the State may exercise powers which may be said to partake of the nature of the powers granted to the general government, but strictly are not such, but are local powers."

The State of Alabama affords an illustration in point, requiring, by State law, that all locomotive engineers on the railroads in that State should be examined and licensed. This and another law forbidding persons afflicted with color blindness to serve on railroads in the State were sustained by the Supreme Court,⁴ which, however, holds further that the power of Congress to regulate commerce "might with equal

¹ *United States v. Cruikshank*, 92 U. S. 542; *Collector v. Day*, 11 Wall. 113; *Coe v. Errol*, 116 U. S. 517; *Dobbin v. Comrs. of Erie Co.*, 16 Pet. 447; *Osborn v. U. S. Bank*, 9 Wheat. 897; *McCulloch v. Maryland*, 4 Wheat. 318, 429, 480; *Gibbons v. Ogden*, 9 Wheat. 199, 210; U. S. Treasury Circular, November, 1884, December, 1884, August, 1892, prohibited the entry of rags; see *Lockwood v. Bartlett*, 130 N. Y. 340.

² *Leisy v. Hardin*, 135 U. S. 100.

³ *Wilkerson v. Rahrer*, 140 U. S. 541; *Leisy v. Hardin*, 135 U. S. 100. In July, 1892, the Secretary of the Treasury of the United States, as a precautionary measure against cholera, directed the collector of customs along the Atlantic coast to prohibit the landing of immigrants from France.

⁴ *Smith v. Alabama*, 124 U. S. 465; *Nashville, Chattanooga & St. Louis R. R. v. State*, 128 U. S. 96.

authority be exercised in prescribing the qualifications of locomotive engineers employed by railroad companies engaged in the transportation of passengers and goods among the States, and in that case would supersede any conflicting provisions on the same subject, made by local authority." The same rule was held as to marine torts.¹ It would, therefore, seem that on many subjects there is room for both the general and local administration. Something of peculiar, special, local and exclusive interest may occur.

A sudden outbreak of danger in a village, as at Johnstown, in the State of Pennsylvania, in a valley at the base of a great water supply, blocked by dams, and exposed to inundation; or the case of a mountain village near or remote from a system of drainage, and stricken with virulent typhoid fever, must be met, and the local authority has at once its duty to perform without waiting for even State action. An example was recently before the people of New York, when tuberculosis was discovered in herds of cows in a neighboring county furnishing milk both to creameries, whose products were widely distributed, and also to the daily consumption of the Metropolis. There the local authorities of the town, of the county, of New York, and the health officers of the State, probably also the department of agriculture of the national government, all had duties imposed by such an occasion, and all without necessary clashing of powers or interest. Certainly the milk could be excluded from New York city, and prosecution might have followed injury if evidence was supplied of the sale of unwholesome food.

These national powers have been exercised by Congress, in respect to the exportation of diseased cattle, and for the extirpation of pleuropneumonia, and other contagious diseases, among domestic cattle, by the acts of May 29, 1884, August 30, 1890, and the act of March 3,

¹ *Sherlock v. Alling*, 93 U. S. 99; see *Patterson v. Kentucky*, 97 U. S. 501, where the conviction of the plaintiff in error was affirmed, the offense being the sale, within the State, of oil for illuminating purposes, for which letters-patent of United States had been granted, but it did not conform to the provisions of the law of Kentucky, approved Feb. 21, 1874, and had been branded by a State officer as unsafe for illuminating purposes. "Exigencies arise which no law has anticipated, and which cannot await the action of the legislature. Property may be destroyed to make bulwarks against floods, and houses may be razed to prevent the spreading of fire, because for the public good." *Mills Em. Dom.*, § 4; *Parham v. Justices*, 9 Ga. 549; *Hale v. Lawrence*, 23 N. J. L. 605; *Saltpeter case*, 12 Coke, 13; *Mouse's case*, id. 62; and see 8 Metc. 462; 13 Minn. 38; 18 Wend. 126; 17 Wend. 285; 39 Iowa, 575.

1891,¹ including the inspection of cattle, sheep or swine and the carcasses or food products thereof, "and providing for the co-operation of the local authorities as follows," whenever the plans and methods of the Commissioner of Agriculture be accepted by any State or Territory in which pleuro-pneumonia or other contagious diseases are declared to exist, or such State or Territory shall have adopted plans and methods for the suppression of said disease, and such plans and methods shall be accepted by the Commissioner of Agriculture, etc., etc., then the investigations, quarantine measures and expenditures authorized by the act may be realized, so far as necessary, in such Territory, to prevent the spread of the diseases. Railroads and vessels within the United States are forbidden by the laws to receive for transportation any live-stock affected with any disease, from one State or Territory to another, and the several United States district-attorneys are required to prosecute violations of this act. Under the act of August 30, 1890, for the inspection of meat for exportation,² prohibiting the importation of adulterated articles of food or drink, and authorizing the President to make proclamation in certain cases for other purposes, elaborate provisions for inspection of food, liquors and "neat cattle, sheep and other ruminants and swine," are made. Certain ports for importation and quarantine are to be designated by the Secretary of Agriculture, and the Secretary of the Treasury, and importations of animals through other ports prohibited, and importation may be suspended, when in the opinion of the President this is necessary, and he shall issue such proclamation.

Wherever there is exclusive control of a subject there is, of course, in the same authority, a corresponding duty and obligation. Thus in the acts of Congress of August 2 and 3, 1882, to regulate the carriage of passengers, and to regulate immigration, even the cubic air spaces are determined, milk is commanded to be furnished to mothers with children, and surgeons are to be furnished. Convicts, lunatics, idiots and persons unable to take care of themselves without becoming a public charge, shall not be permitted to land. Convicts, except for political offenses, shall be returned to the nations to which they belong. And the Secretary of the Treasury is directed to prepare rules for the

¹ 23 Stat. L. 31; see, also, acts Feb. 9, 1889, chap. 122, §§ 520-9; March 2, chap. 373, 1889; Supp. R. S. 679.

² 26 Stat. L. 414.

protection of the immigrant who needs it, and for the return of those not permitted to land. A duty of fifty cents¹ for each and every passenger not a citizen of the United States is to be levied, and to constitute the immigrant fund. The Secretary of the Treasury may use the aid of any State organization for carrying into effect the objects of the law, by distributing the fund in accordance with the purpose for which it was raised, not exceeding in any port the sum received from it. In fact, this fund was administered for years by the State Commissioners of Emigration. The immigrant once landed, had then to face the local health laws so far as these were exclusively and reasonably for protection; but even before this, as we have seen, under this act of Congress, the national and State administrations worked together. So far is the tendency exhibited, in the spirit of our Anglo-Saxon jurisprudence, to make the local administration supreme in purely local matters, that in most States² by general law, the duties are imposed upon local authorities of action by sanitary and police regulations for the public health and safety.

Under the Public Health Act of England of 1875, 38 and 39 Vict., chap. 55, as also under the Town Police Clauses Acts, 10 and 11 Vict., chap. 89, "Model by-laws for the use of sanitary authorities" were printed and distributed and common lodging-houses, public baths, markets, new streets and buildings, hackney carriages, cleansing of footways and pavements, removal of house refuse, cleansing of earth closets, privies, ashpits and cesspools, markets, slaughter-houses, and in the same manner by like legislation, food and the water supply were to

¹ Head Money cases, 112 U. S. 589, 594. By a late law vessels from Canadian or Mexican ports are freed from this duty, until the act is made applicable to passengers entering the United States by land carriage.

² In England under Public Health Act of 1848 "The General Board of Health" was appointed, and reconstructed in 1854 and 1858, and many local acts were passed for the same purpose. These were many of them consolidated in the law of 1875. see division of England into districts—urban and rural sanitary districts—under Public Health Act of 1872. The Local Government Act of 1848 was to be construed with the Public Health Act of same year. New York State Laws, chap. 324, 1850; chap. 790, 1867; chap. 291, 1870, §§ 3, 8; chap. 322, 1880, and amendments; Law of Mississippi approved March 4, 1880; Massachusetts Health Laws, 1849, 1869, 1875. In State Board of Health Report No. 7, 1876, see chapter on Pollution of Rivers, Drainage and Health of Towns, Michigan State Board of Health Reports, 1873, *seq.* In 5th Report, 1877, p. 21, see circular to city governments and village authorities throughout the State relative to boards of health under law of that year, also annual reports of State Boards of Health of California since 1870; Louisiana, 1870; Minnesota, 1872, New York State, 1880.

be regulated. In like manner in New York State provision has been made by State law compelling the institution of local and village boards of health¹ outside of the great cities, whose charters vest in and enjoin upon them, special duties and powers upon this subject. Model by-laws were framed and distributed by the State Board of Health,² and the State authorities have compelled the organization of local boards of health. The sovereign and exclusive local administration, especially in health matters, is to be observed in the charter of New York city. A great city, a port of entry, and a metropolis, has a life by itself, and though its gates in one sense are national, yet more particularly, they lead within limits, which are not to be encroached upon by any other authority, and which are jealously preserved. The requirements of London, Paris, New York, Philadelphia, Boston, Richmond, Mobile and New Orleans for protection and safety and even for harbor improvements and port dues, are peculiar to themselves, as the Supreme Court held, the proper rules for quarantine on the Mississippi must vary from those of New York.³

The constitutional amendments "were not designed," says the court in *Barbier v. Connelly*,⁴ "to interfere with the powers of the State, sometimes termed police powers, to prescribe regulations to promote the health, peace, morals, education and good order of the people and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these

¹ N. Y. Stat. chap. 512, 1880; chap. 322, 1880, § 1; chap. 324, 1850; chap. 291, 1870, §§ 3, 8; chap. 281, 1878; chap. 438, 1860; chap. 737, 1873; chap. 415, 1876; chap. 888, 1869; State Board of Health Manual of Laws, 1880; chap. 410, 1882; chap. 808, 1882; chap. 270, 1885; chap. 809, 1888; chap. 543, 1888.

² Reports N. Y. State Board of Health, 1880, 1881, 1885; see especially chap. 270, 1885; *Gould v. City of Rochester*, 105 N. Y. 46; chap. 335, 1873; chap. 410, 1882.

³ 118 U. S. at p. 464; see the wise remark of Mr. Justice Catron in the *License cases*, 5 How. 606: "So minute and complicated are the wants of commerce when it reaches its port of destination that even the State legislatures have been incapable of providing suitable means for its regulation between ship and shore, and, therefore, charters granted by the State legislatures have conferred the power on city corporations. Owing to situation and climate, every port and place where commerce enters a State must have peculiarity in its regulations; and these it would be exceedingly difficult for Congress to make; nor could it depute the power to corporations, as the States do."

⁴ 118 U. S. at pp. 31-32.

objects in view, must often be had in certain districts,¹ such as for draining marshes and irrigating arid plains. No national authority can properly fix the fire limits for wooden buildings in any city, and to declare that a local enactment is forbidden by the government, is a duty of extreme delicacy, for apart from the necessity of avoiding conflicts between co-ordinate branches of the government, it is often difficult to determine whether such enactments are within the powers granted or possessed by the legislature.

"Special burdens are often necessary for general benefits, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes press with more or less weight upon one class than upon another, but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote with as little individual inconvenience as possible the general good. Though in many respects necessarily special in their character, they do not furnish just ground for complaint, if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation discriminating against some and favoring others is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

In England, it is to be remembered, the limitations are not the same as in this country by common law and precedent, the *lex non scripta* often prevailing. Furthermore, while the same necessity does not there exist, for continually new expansions, or expressions of the doctrine, partly because there, these questions do not arise of interstate commerce, now appearing with new importance in the development of our country and civilization; and partly because the questions involved are to be approached in that country from the opposite side to our own.

¹ *Powell v. Pennsylvania*, 127 U. S. 678; see Cal. Constitution, art. XIX, Chinese. Hostile and discriminating legislation by a State against persons of any class is forbidden by the fourteenth amendment to the U. S. Constitution. A city ordinance affecting with special severity Chinese prisoners is unconstitutional and void. The right to reside in a foreign country implies the right to labor there for a living. A State has no power to interfere with the operation of a treaty of the United States, or deny privileges guaranteed by it to Chinese residents, nor can it prevent Chinese from working on streets and public works. Only the government of the United States can determine what aliens and upon what conditions they may land. *Baker v. City of Portland*; *Ho Ah Kow v. Nunan*, 3 Pac. C. L. J. 472, 413; *Chapman v. Toy Long*, 4 Sawy. p. 28; *Yick Wo v. Hopkins*, 118 U. S. 356.

There almost every trade, every pursuit, all property has been subject to claims, dues, tenures, charges and restrictions, and they have been more and more freed by the advance of liberalism. Here in this country, more of centralization, and of strong government, has been a comparatively new necessity, reached through the natural growth of liberty, conformable, it is true, to law, but having to recognize new obligations, as communities became more numerous in the same areas, and more dense. The obligations remaining from the feudal system in England, those from guilds of trade, the privileges of the crown, of the nobility, of great corporations, and the church and parish system, the licenses to publishers, and theatres, the almost infinite number of customs become law, in every trade and pursuit, the real-estate law, upon all of which encroachments for freedom of the people have been constantly made in England, we disposed of with rapid and vigorous strokes, and we began with our Federal Constitution and our State Constitutions and new institutions, among them most important, our township system with its consequences of local self-government, of which England has only lately acquired adequate vision. Hence it is that we might almost say police powers have rather diminished in England, and increased in America.

The result, however, in each country is about the same, for it will be found the traditions of the common law and our new jurisprudence embody the same principles; the occupations of the people are not dissimilar, and to both, the courts are the interpreters of the laws, which can only prevail if they do not invade "the rights of life, liberty or property, or other rights secured by the supreme law of the land." "In England," says the opinion of the Supreme Court, by Mr. Justice Field, in *Missouri P. R. R. v. Humes*,² "the requirement of due process of law, in cases where life, liberty and property were affected, was originally designed to secure the subject against the arbitrary action of the Crown, and to place him under the protection of the law. The words were held to be the equivalent of 'law of the land.' And a similar purpose must be ascribed to them when applied to a legislative body in this country, that is, that they are intended, in addition to other guarantees of private rights, to give increased security against the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property. But from the number of instances in which these words

¹ *Powell v. Pennsylvania*, 127 U. S. 678.

² 115 U. S. at p. 519.

are invoked to set aside the legislation of States, there is abundant evidence, as observed by Mr. Justice Miller, in the case¹ referred to, that there exist some strange misconceptions of the scope of this provision. It seems, as he states, to be looked upon as a means of bringing to the test of the decision of this court, the abstract opinions of every unsuccessful litigant in a State court, of the justice of the decision against him, and of the merits on which such a decision may be founded." And the court adds: "This court is not a harbor where refuge can be found from every act of ill-advised and oppressive State legislation." This opinion of Mr. Justice Miller states further: "It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the Federal government for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised, has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its power has rarely been invoked in the judicial forum, or the more enlarged theatre of public discussion. But while it has been a part of the Constitution as a restraint upon the power of the States only a few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty or property without due process of law. There is wisdom, we think, in ascertaining the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion as the case presented for decision shall require, with the reasoning upon which such decision may be founded."

The powers not delegated to the United States are original powers in the State inherent in sovereignty,² and hence may be delegated as frequently to municipalities. They extend, as we have seen, over the internal commerce and trade of the State, the improvement in rivers, harbors, roads and bridges, the protection of lives, limbs, health, comfort, morals and quiet of all persons and the protection of all property in the State; the introduction of articles and persons not rightful subjects of commerce or international intercourse, and dangerous to the local community, the introduction and preservation of game, the sale of dangerous and noxious fluids, liquors, oils and substances, to prevent monopolies and forestalling and regulate matters and business

¹ Davidson v. New Orleans, 96 U. S. at p. 104.

² Constitution, art. X; 9 Wheat. 205.

in which there is a public interest and charge, and which require government interference;¹ inspection laws, license laws within State limitations, quarantine and health laws, the regulations of rights of citizens and of property, the prevention of frauds, in fine all that the law of overruling necessity shall require for the protection and welfare of the people.

The difficulty, says the court, in a recent case,² of drawing a clear line of distinction between articles which, from their nature, the legislature of a State may exclude as injurious to health or morals, and those which must be deemed proper objects of commerce, is obvious. Nor is it easy to define with exactness what subjects should be considered so far local that statutes in respect to them may properly be passed by a State, though incidentally affecting commerce among the several States until Congress provides otherwise. It belongs to the legislative branch of the government to determine primarily what measures are appropriate and needful for the protection of the public morals, the public health or the public safety. It does not at all follow that every statute enacted for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully³ go. The presumption that a statute was enacted in good faith for the purpose expressed in its title, cannot control the final determination of the question. There may be no purpose upon the part of a legislature to violate the Constitution, and yet a statute under the form of law may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void.⁴

¹ *M'Culloch v. Maryland*, 4 W. 429; *Osborn v. U. S. Bank*, 9 W. 896; *United States v. Cruikshank*, 92 U. S. 542; *Presser v. Illinois*, 116 U. S. 252; *Van Hosen v. Kanouse*, 18 Mich. 803; *Anderson v. Boker*, 23 Md. 531; *Slaughter-house cases*, 16 Wall. 63; *Bartmeyer v. Iowa*, 18 Wall. 188; *Vanderbilt v. Adams*, 7 Cow. 848; *People v. Jenkins*, 1 Hill, 469; *Toledo v. Deacon*, 68 Ill. 91; *Passenger cases*, 7 How. 283; *Moore v. Illinois*, 14 How. 13; *State v. Randolph*, 1 Mo. App. 15; *Phelps v. Racey*, 60 N. Y. 10; *U. S. v. De Witt*, 9 Wall. 41; *Holmes v. Jennison*, 16 Pet. 617; *Munn v. Illinois*, 94 U. S. 147; *People v. Budd*, 117 N. Y. 1; 143 U. S. 517; *New York v. Miln*, 11 Pet. 131; *Morgan v. Louisiana*, 118 U. S. 455.

² *Commonwealth v. Huntley*, 156 Mass. 236; *Commonwealth v. Schollenburger*, 27 Atl. R. 30; *Commonwealth v. Zelt*, 188 Penn. St. 615; *Miller v. Ammon*, 145 U. S. 421.

³ *Mugler v. Kansas*, 123 U. S. 623; *Sinking Fund cases*, 99 U. S. 718; *People v. Gillson*, 109 N. Y. 869; *Railway Co. v. State*, 49 Ohio 189. *Civil Rights cases*, 109 U. S. 8.

⁴ *State of Minnesota v. Barber*, 136 U. S. 813.

There is no common law of the United States in the sense of a natural customary law, distinct from the common law of England as adopted by the several States, each for itself applied as its local law, and subject to such alteration as may be provided by its own statutes.¹ A determination in a given case of what that law is may be different in a court of the United States, from that which prevails in the judicial tribunals of a State.² In cases also arising under the *lex Mercatoria*, by reason of its international character, the Supreme Court has been less influenced by the decisions of State courts. One exception, however, occurs. The interpretation³ of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law and are to be read in the light of its history. The laws and decisions of the States may somewhat vary. In them, however, are the chief repositories of police powers.

"Laws setting aside Sunday as a day of rest," says Mr. Justice Field in *Soon Hing v. Crowley*,⁴ "are upheld not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops, and in the heated rooms of our cities, and their validity has been sustained by the highest courts of the State."

If the public safety or the public morals require the discontinuance of any manufacture or traffic, the legislature may provide for its discontinuance⁵ notwithstanding persons may suffer inconvenience. The question as to the constitutional power of the State to prohibit the manufacture and sale of intoxicating liquors is no longer an open one.⁶ A prohibition simply upon the use of property for purposes that are declared by valid legislation to be injurious to the health, morals or safety of the community, cannot in any sense be deemed a taking or appropriation of property for the public benefit. The

¹ *Wheaton v. Peters*, 8 Pet. 591.

² *N. Y. Cent. R. R. v. Lockwood*, 17 Wall. 357.

³ *Smith v. Alabama*, 124 U. S. 465.

⁴ 113 U. S. 710.

⁵ *Beer Company v. Massachusetts*, 97 U. S. 25; *Coates v. Mayor, Ald. and Com. of N. Y.*, 7 Cow. 585.

⁶ *Foster v. Kansas*, 112 U. S. 206.

State has the power to declare any place maintained for the illegal manufacture and sale of intoxicating liquors a public nuisance,¹ order it to be abated, and at the same time provide for the indictment and trial of the offenders. Proceedings in equity are not inconsistent with due process of law. A jury trial is not required in suits of equity brought to abate a public nuisance. In like manner an Iowa law, authorizing the abatement, as a nuisance, of a distillery was upheld.² A recent decision of the Alabama Supreme Court holds, that a statute providing that any banker who discounts any note at a higher rate of interest than eight per cent, is guilty of a misdemeanor, and that the buying an acceptance, and reserving and retaining the interest until maturity is a discount, and that no rights can spring from, or be rested upon, an act, in the performance of which, a criminal penalty is incurred, and that all contracts made in violation of a penal statute are void; that this statute is not class legislation,³ but a valid exercise of the police power, and no recovery can be had on such paper so illegally discounted. The Supreme Court of Massachusetts in May, 1892, sustained the State statute, chapter 58 of 1891, prohibiting the manufacture or sale, or offering or exposing for sale, any article in the imitation of yellow butter,⁴ as a valid police regulation; and the opinion therein cites many instances of laws upheld, relating to the sale of milk, vinegar, adulterations and food, the sale of jewelry, feathers and other articles by peddlers, the sale of oleomargarine in imitation of butter, the seizure and destruction of lottery tickets: and acts to prevent frauds are sufficient examples of such legislation. To this list we may add laws fixing hours of labor, laws for the protection of females and children, the prevention of cruelty to children and to animals, laws fixing rates for telephones and elevators,

¹ *Mugler v. Kansas*, 123 U. S. 628; *Alliance v. Joyce*, 49 Ohio, 7.

² *Kidd v. Pearson*, 128 U. S. 1.

³ *Youngblood v. Birmingham Trust and Savings Co.*, 95 Ala. R. 521; *Pennington v. Townsend*, 7 Wend. 276.

⁴ *Commonwealth v. Huntley*, 156 Mass. 236; see decisions N. Y. Sup. Ct., Sp. Term, New York city, July 21, 1882, by Andrews, J., in *People v. Ewer*, that the law in question is a proper exercise of police power, the legislature having declared it was inimical to the morals of the State to allow children under fourteen years of age to dance on the stage. The courts cannot go behind the discretion exercised by the legislature. *Matter of Stevens*, 54 N. Y. St. R. 559; *People v. Grant*, 54 N. Y. St. R. 349; *Van Walters v. Board*, 132 Ind. 567; *People v. Cannon*, 54 N. Y. St. R. 481; *Seville v. State*, 49 Ohio, 117; *Com. v. Crowell*, 156 Mass. 215.

and regulating gas and electric-light companies, and governing the liquor traffic within the State, laws regulating tenement-houses, lodgings and hotels, general health laws, and those relating to vital statistics, the general food, drugs, inflammable oils and water-supply laws, and yet the enumeration would not be complete.

In the State of New York a law was passed in 1890¹ prohibiting the use of cigars, cigarettes and tobacco by any children apparently under sixteen years of age in any public street, place or resort, and declaring a violation of the act a misdemeanor punishable by a fine of not less than two or more than ten dollars. In the Factory Acts, wherein for the same reasons given by the Supreme Court in *Soon Hing v. Crowley*, and as elsewhere stated, from motives of humanity, statutes have been passed for regulating hours of labor, preserving the health and promoting the education of young persons employed in mills and factories, two administrations will often be found to work together, each in its own sphere. The State regulates the hours of work, the age at which children may be employed and their care, their meal times and holidays, and also in certain trades and shops particular provisions are made for cleanliness and ventilation, and for inspections. Then the local administration regulates further the building, the rooms and the necessary health appliances and conveniences.

The Factory Acts Extension Acts of England, 1864 and 1867, extended these provisions² to certain trades regarded as those usually unwholesome. The Home Secretary of England has certain powers to modify some of the provisions in trades whose customs and exigencies demand some difference of treatment. The Factory and Workshop Acts of 1870, 1871, 1874, and similar acts later, carry out the same principles. In New York and other States the Factory Acts³ cover the same

¹ N. Y. Stat. 1890, chap. 417. R. I. Stat. and Colorado Stat. 1892, are similar, and it is said that twenty-four of the States have such enactments. See Ann. Address Am. Bar Ass. 1892, J. F. Dillon, Alb. L. J., vol. 46, p. 229.

² 113 U. S. 708.

³ See Factory Acts and Workshop Regulation Act, 42 George III, chap. 73; and 3 and 4 Will., chap. 1, chap. 103; 7 and 8 Vict., chap. 15; 10 Vict., chap. 29; 13 and 14 Vict., chap. 37; 16 and 17 Vict., chap. 102; 19 and 20 Vict., chap. 38; 23 and 24 Vict., chap. 78; 27 Vict., chap. 38; 28 Vict., chap. 98; 24 and 25 Vict., chap. 117.

⁴ N. Y. Stat. 1886, chap. 409; 1887, chap. 462; 1889, chap. 560; 1890, chap. 398; N. Y. City Sanitary Code, §§ 20-23; N. Y. City Fire Department Regulations, Fire-Escapes, etc.; N. Y. Building Laws, N. Y. City Cons. Act of 1882, as amended,

ground, and provisions of law require, in all stores and factories, guards for hoistways and well-holes; hand-rails are required on stairs, fire-escapes, guards for shafting and belts; wash-rooms and closets and dressing-rooms are provided for, as may be found necessary by the factory inspectors. The New York City Sanitary Code, and the Fire and Building Regulations again require provisions for health, ventilation, and safety.

Local administration has to take up these subjects and enforce its necessary regulations in the early history of every city. In London a regulation was passed in 1229 that markets should only be kept in places appointed for them, and that "no person should buy wares in Southwark that were to be bought in the city." In 1290 the exhalations from the Fleet overcame the incense burned at the altars of neighboring churches. In 1306 the citizens of London petitioned Edward I, the king, to prohibit the use of sea coal, so as to avoid the smoke, and the king caused a law to be passed, making the use of sea coal in London a capital offense. In spite of all such precautions, however, Evelyn, in 1661, complains that gardens will no longer bear fruit because of the smoke.¹ In 1307 the Thames was clogged with the accumulations of filth and impassable to the city for ships. In 1328 the sole right to establish markets within seven miles of the city of London was granted by charter 9 Edward III, to the corporation of London, and in 1332 the mayor made a decree regulating the markets, and in 1345 the sale of poultry in lanes and hostels was forbidden. In 1429 slaughter-houses were licensed by the justices, and in 1874 the Slaughter-Houses Act was passed, but cattle continued to be killed in great numbers in underground cellars.²

The removal of offal had given a bad name to Red Rose lane, by East Cheap Market, called Pudding lane, because the butchers used it for refuse until transferred to their dung-boats. By Richard III, a law was passed that no flesh should be killed in London, but only at Knightsbridge, or at such like distance from the city. But although London was a borough by prescription, and hedged in and defended by many charters, privileges, rights and powers, even to laying duties on the entry of some articles, so that it was said to defy reform, yet royal

especially chap. XI; see, also, chap. 720, 1887, an act to provide fire-escapes in hotels, whereby coils of rope were required to be placed with suitable iron hooks to sustain a weight of four hundred pounds in every room; *Rose v. King*, 49 Ohio, 218.

¹ John Evelyn, *Fumifugium*, 1661; *Knights London*, vol. I, pp. 228, 232.

² *Ency. Brit. s. v. London*; *Knights London*, vol. II, pp. 150, 152, 326.

and parliamentary commissions early made entrance, and undertook metropolitan work within the limits of the corporation. Thus by a commission of sewers, appointed by act of Henry III in 1531, and renewed in 1548 by Edward VI, and extended in its application by James I in 1607, the Fleet was bridged and sewered in 1637, and this great sewer, draining four hundred acres, served with little change until widened in 1841. Until 1848 the discharge of house drainage into the main drainage was forbidden, and the construction of cess-pools was enforced.

Under the Metropolitan Act of 1848 a more satisfactory system was adopted, but in 1855 was passed the Metropolitan Local Management Act, providing for the creation of the Metropolitan Board of Works, in which latter body, with the thirty-nine vestries or district boards, is located much of the practical administration of that metropolis. In the province of this board come the formation of new streets, the organization and maintenance of parks, commons and the fire brigade, while various corporations, such as the water-works companies, exercise authority in special matters over the whole area, or in separate localities in the metropolis. The Court of the Common Council has independent functions, and power to enact regulations for the city government.¹ It is evident that, except historically, little assistance is to be found in such a conglomeration of systems for our discussion, but it is of advantage to see of how ancient growth many of our modern municipal regulations are, far more arbitrary and inflexible than now; and furthermore this expedient of the creation of a metropolitan district of the State, to include a city, and govern the public interests over its head, if need be, is of no recent origin. The Commission of Sewers of 1531, and the Metropolitan Local Management Act of 1885, formed legislation not dissimilar to that which has prevailed in the city of Washington or in the laws enacted in New York State² to create metropolitan districts in New York, and Kings, Richmond and Westchester counties. Justice Davis, in his dissenting opinion in the Pinckney cases, says: "Conceding that a metropolitan fire district is created by the act composed of the cities of New York and Brooklyn, it cannot be

¹ Ency. Brit. s. v. London; Knights London, vol. I, pp. 231, 232, 234, 237; Stow, 61, p. 24; Blackstone Comm. III, 74.

² See Laws of N. Y. State 1857, chap. 569; 1865, chaps. 149, 759; 1866, chap. 74; People v. Met. Police Board, 19 N. Y. 188; People v. Met. Police Board, 26 N. Y. 316; People v. Pinckney, 32 N. Y. 377; People v. Wood, 15 N. Y. 532; Met. Board of Health v. Heister, 37 N. Y. 661.

doubted, but that the officers created under it are limited in their authority and functions to the city of New York."

Several of our cities have presented, in greater or less degree, the difficulties found in London from the rigid, unbending nature of privileges and immunities under charters older than the States. They have, however, generally in one form or another been overcome. In the city of New York commissions form departments of the city government, yet with separate and independent functions for the public protection and using powers granted by laws of the State.¹ The sanitary ordinances of the Sanitary Code, adopted and published by the Board of Health, have the force of laws in that city, while the provisions of the State laws and the regulations adopted in obedience thereto by the Building and Fire Departments have like force and effect. Acting in unison with the co-ordinate departments, the officers of the Public Works and the Aqueduct control the water mains and sewers, and the regulation of plumbing and drainage is in the city officers. Tenement-houses and local trades and pursuits, nuisances of all kinds, local traffic, the use of streets, street lighting, height of buildings, public conveniences, telephone and electric companies, docks and dockage, transit cars and surface cars are controlled so far as the local interests alone are concerned; and a careful watch is kept of all diseases and sources of danger; of what is practically a city quarantine; of vital statistics; of the public schools and school children; and in a range of government functions, which, though limited to this territory, are of great importance. Many of the ordinances enforced antedate, by many years, the present system of government. Thus in 1828 buoys marked the places for anchorage; nothing should approach and nothing be thrown into a boat from a vessel subject to quarantine;² the mayor or president of Board of Health could issue his proclamation, declaring a place infected, and thereafter a quarantine of thirty days was necessary for any vessel coming from such place and intercourse between the city of New York and such

¹ N. Y. City Cons. Act of 1882, as amended, chaps. 9, 11, 12, 13, 14; *Polinsky v. People*, 73 N. Y. 265; *Penn. Co. v. Stegemeler*, 118 Ind. 305; *Blanchard v. Bissell*, 11 Ohio St. 96; *State v. Lee*, 4 Crim. Law Mag. 79; *Elliott Roads and Streets*, 625; *Com. v. Abrahams*, 156 Mass. 57; *Com. v. Cutler*, 156 Mass. 52; *Com. v. Crowell*, 156 Mass. 215; *City of Vincennes v. Citizens, etc., Co.*, 132 Ind. 114; *Citizens Electric L. & P. Co. v. Sands*, 95 Mich. 551; *Pratt v. Borough of Litchfield*, 62 Conn. 112.

² 1 R. S. chap. XIV of the Public Health edition of 1863, titles I, II, III, V, and also title VI, pp. 436-451; chap. 275, Laws 1850.

place could be prohibited; the Board of Health could adopt measures for cleansing and purifying all buildings, lots and places, and cause any avenue, street or alley to be closed if the public health required it; to forbid and prevent communication with any infected house; or different parts of the city, and to take and exercise extraordinary powers "when-ever a contagious disease shall appear in the city, as in their judgment the circumstances of the case and the public good shall require."¹ The Board of Health or the Commissioners could cause any cargo, putrid or otherwise dangerous matter, to be destroyed, and send to the hospitals persons, not resident in the city, sick with any malignant or contagious disease. Physicians' were required to promptly report patients sick with certain diseases and deaths of fever. Boarding-houses and masters of vessels had to make like reports. No salted provisions were to be packed or repacked or deposited south of Canal street from May 1 to October 1 in any year, except that retail grocers might keep not to exceed five barrels in sound and good condition for their customers, and butchers might keep provisions in the public markets, or heads of families keep them for family use. Such articles might be ordered removed, or removed and, if necessary, destroyed, and the expense must be borne by the owner. Every person, including the physicians, who violated these laws was guilty of a misdemeanor and liable to both fine and imprisonment. No rags, hides or skins, arriving in the same period, could be taken, except under a permit, to any place south of Spring street, or they might be seized and sold by the Commissioners of Health for the use of the Marine Hospital. The Commissioners of Health could sue for the fines and penalties. Somewhat similar provisions were adopted for the other cities in the State. Regulations of trade, of sales by auctioneers, inspection of provisions, of tare in butter firkins, and in packing of hay, regulations of hawkers and peddlers and regulations of ferries and inns were also of an early period. It will, therefore, appear that there is no great innovation in the present laws, many of which had their origin in the early colony.

The old court² under the Dutch government of Burgomaster and Schepens ruled burghers, residents and all incomers with a rod of iron for the peace, protection, good morals and quiet of the community.

¹ N. Y. State, Act of 1828; Act of 1839, chap. 359; Act of 1850, chap. 275.

² 1 R. S., Ed. 1863, title III, 440-451; titles VI and VII, chap. XVII, p. 528; Laws 1850, chap. 144, 324; Acts of May, 1828, and 1846, chap. 62; 1 R. S. 527, chap. XIV, pp. 423-448.

³ Daily Judicial Organization, 1 E. D. Smith, XIX; Governor Minuit's Council of five in 1626 were invested with all legislative and executive powers.

In 1686 the Dongan charter¹ gave like power, and under the subsequent governments of the city, the board of aldermen and the common council enacted and enforced ordinances, which represent almost exactly the powers and requirements to be found in the present charter of New York.

In some of the States, the principal health and quarantine powers, for the local administration in the counties of the State, are reserved to a State Board of Health, as in Mississippi by the act of March 4, 1880,² and the health authorities and the chief health officer report to the State Board of Health, who advise officers of the State, county or local governments in regard to sanitary drainage, ventilation and sanitary provisions of any public institution or public place. The local officers examine and report in regard to ventilation of theatres and public buildings; to preservation of human life in case of fire; to matters for the preservation of health in public schools; any matter affecting injuriously the public health; and generally in regard to the public health of the county. It is made the duty of the chief health officer of each county to examine the drinking water in different localities, make known impurities discovered to the public, giving at the same time means to purify the same. He shall report on stagnant pools, market-houses or butcher stalls, etc. Process is authorized by means of declaration of nuisance and information in the name of the State by the district attorney, and in urgent cases the information may be tried on five days' notice. Enforced vaccination is provided for. Incorporated towns are empowered to pass sanitary laws and suppress nuisances and make and enforce ordinances for registration and mortuary statistics. The State Board of Health may establish quarantine to prevent the introduction of yellow fever or other infectious diseases. Fines and penalties are provided, and the employment of inspectors authorized. In general, we may say that the next step in local administration is in the townships and incorporated villages. For them Boards of Health have been devised, and by-laws, ordinances and regulations prepared, which they adopt and enforce on the various subjects enumerated, affecting the public interests for the public protection in their localities. In New York State the system is quite complete, and the State Board of Health has supervisory powers, save in the great cities ex-

¹ Id., XLVII, Kent's charter and note, 41-209; City Ordinances, N. Y. Const. Act of 1882; Sanitary Code; Manual of Fire and Building Laws, New York city, etc.

² An act to amend the statutes in regard to Boards of Health of Mississippi, approved March 4, 1880.

cepted by reason of their chartered duties and powers from the provisions of the Act of 1880, constituting the State Board. The electors of each town adopt and publish the necessary regulations.¹ They provide for the destruction of noxious weeds, maintain pounds and lock-ups, make rules for fences, impose penalties and apply them, when recovered, as they may think most conducive to the interests of the town. They shall organize a board of health of the supervisor, justices of the peace and the town clerk, or a majority of them, together with a citizen to be elected by them, which board shall have power to appoint a health officer, and shall have cognizance² of causes of injury to the public health, and make orders and regulations in their discretion, concerning quarantine examinations, and purification of vessels, boats and other craft not under quarantine, the apprehension, separation and treatment of emigrants, and other persons who shall have been exposed to any infectious or contagious disease, the supervision and removal of nuisances, and enter upon or within any place where conditions dangerous to the public health are believed to exist. They may issue warrants to any constables of their respective cities, villages or towns, to apprehend and remove such persons as cannot otherwise be subjected to the orders and regulations by them adopted, and, when necessary, issue warrants to the sheriff of their respective counties, to bring to their aid the power of the county. Penalties are provided, or they may proceed by injunction to restrain violations or otherwise enforce their ordinances and regulations. The registration of births, marriages and deaths is also provided for. Incorporated villages³ are under like provisions and have the power under the act of incorporation to enact and enforce the necessary regulations and ordinances. Their procedure is by a board of village trustees. Such board of trustees is required, under the law previously quoted, to appoint once in each year a board of health of such village, to consist of not less than three, nor more than seven persons. Such village board of health has all the powers and duties of the local board of health as prescribed in the law of 1885.

¹ 1 R. S. §§ 339, 340, 341, 342, 343; Laws 1839, chap. 389; Laws 1859, chap. 107; Laws 1886, chap. 30.

² See circular 25 in N. Y. State Board of Health, July 1, 1881, Report of 1881; Laws 1881, chap. 431; Laws 1882, chaps. 351, 308; Laws 1880, chap. 322; Laws 1885, chap. 270; Laws 1888, chaps. 146, 309; 105 N. Y. 46; see N. Y. Laws 1892, chap. 292; Town Law, § 24; power of Town Meetings to abate public nuisances and raise money sufficient to pay expenses, chap. 559, 1890.

³ L. 1870 chap. 291; L. 1878, chap. 281; L. 1875, chap. 339; L. 1874, chap. 628.

Local officers in New York State as well as the State Board of **Health** have duties enjoined¹ and vested in them respecting the management and control of the potable water, and to secure the water supply from any defilement.

¹ L. 1885, chap. 548 ; L. 1888, chap. 52 ; 105 N. Y. 46 ; Manual of State Board of Health, 1880.

CHAPTER IV.

MANDATORY AND RESTRAINING LAWS.

Mandatory and restraining laws affecting freedom of action, and the use and enjoyment of property, where public interests and the rights of others are concerned, may be constitutionally enacted, and are found in numerous instances in the statute books of the different States. They have limitations, and cannot arbitrarily and unreasonably deprive the citizen of liberty or property, but such is not their result, simply because burdens are imposed, occupations regulated, or individuals and property subjected to restraints in so far as the public welfare is affected, and in so far as the necessity has been determined by the legislature for the establishment of a fixed and general rule, which shall operate alike upon all persons within like conditions. The rights and privileges of every member of society are to be viewed, with respect to his relations to others, and to their government. Those which are purely and exclusively private are not to be controlled by the whole body of the people, but laws are to be established, so that no one shall be unnecessarily injured. The police power of the State, says the Supreme Court of Vermont,¹ extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property in the State. According to the maxim, *Sic utere tuo ut alienum non ledas*, it must be within the range of legislative action, to define the mode and manner in which every one may so use his own as not to injure others. Chancellor Kent explains that though property be thus protected, it is still to be understood that the lawgiver has the right to prescribe the mode and manner of using it, so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of others, or of the public. The government may, by general regulations, interdict such use of property as would create nuisances, and become dangerous to the lives or health, or peace or comfort of the citizens. Individuals or classes of persons may be affected by such regulations, who were not before under similar restric-

¹ Thorpe v. Rutland & B. R. R., 27 Vt. 140.

tions, but the circumstances must be so exceptional as to leave no others affected in precisely the same way, to whom a general law could apply. Distinctions in these respects should be based upon some important reason, requiring the intervention of the government, like the want of capacity in infants and the insane, or the helpless condition of workers in mines, factory operatives, or seamen. The Supreme Court of Illinois, in *Frorer v. People*,¹ has lately given instances of the laws under our present discussion. "License laws, laws or ordinances fixing fire limits, quarantine laws, laws imposing liability upon masters on account of death or injury of servant, laws requiring dangerous machinery to be so guarded and used as to avoid injuries to others, laws to prevent monopolies, extortions and fraudulent impositions, and in general, all laws whereby one person is prohibited from so using his liberty or property as to endanger the liberty or property of another. Under this head may also properly be classed usury laws, and laws that may be found on the statute books of England, and also perhaps on the statute books of some of the States, imposing peculiar and exceptional restrictions on contracts with seamen.

Usury laws proceed upon the theory that the lender and the borrower of money do not occupy the same relations of equality, that parties do in contracting with each other in regard to the loan or sale of other kinds of property, and that the borrower's necessities deprive him of freedom in contracting, and place him at the mercy of the lender, and such laws have been enacted by all the civilized nations of the world, both ancient and modern.

By the common law the master had authority over all the mariners on board the ship, and in case of disobedience, disrespectful or disorderly conduct, he might lawfully correct them in a reasonable manner, his authority in this respect being analogous to that of a parent over his child, or of a master over his apprentice or scholar. By the very nature and necessities of their employment, and the usages and customs governing it, seamen thus constituted a servile class as distinctly marked, and as dependent and helpless in many respects as that of infants, and of necessity they required a measure of protection not required by the citizen who acknowledges no master. In none of the statutes alluded to, is one person denied a privilege or liberty which is allowed to others, under like conditions and circumstances as he is here."

¹ *Frorer v. People*, 141 Ill. 171; and see *People v. Budd*, 117 N. Y. 22; *id.* 143 U. S. R. 517; *Com. v. Alger*, 7 Cush. 84; 2 Kent Com. 340; *Millett v. People*, 117 Ill. 294; *Cooley Const. Lim.* 391.

This last reference to the exigencies of the seaman's life and conditions by no means exhausts the requirements of protection, and the Plimsoll Act in England, and similar acts in our country, have to do with conditions of ships and ship-life whereof regulation was necessary. "The conditions of the humble seafarer's life are a profound mystery to the people who live on shore. No medical officer is unreasonable enough to insist that a ship can ever be made so comfortable and healthful a living place as the house on land, but the laborer before the mast has the same claim to an unstinted share of that air, light and water, which are the common inheritance, as the laborer on shore," remarks Medical Inspector Gihon, of the United States Navy, in his paper read before the Public Health Association at Boston in 1876, and Supervising Surgeon-General Woolworth, in a paper read at the same meeting, says that, "next to the waste by war, in no field of human activity is the waste of human life more strikingly illustrated than among the toilers of the sea," and he emphasizes the defects of ships in strength and equipment, against which much legislation has been directed. In respect to artisans' dwellings, tenement-houses and the houses of the poor, where the landlord and tenant have unequal advantages as compared with the owners and occupants of other houses, and where also the public health and welfare are of peculiar interest and concern, legislation for England, and for our great cities, has made great advances and extended to many details supported by the general feeling of necessity and upheld by many decisions in the courts.

Interest, the incident which the law gives the creditor upon the failure of the debtor to pay the principal of money loaned, called usury when unlawful in amount, we may say, has always been in some form regulated in every civilized community. It has at times, as in England, and in some of our States, been left to the agreement of the contracting parties where the market rates have by experience been found not oppressive, and some writers, as in Chambers' Encyclopedia, have contended that "rates fixed by law have tended to increase the real value of the use of money by driving men in distress to extravagant methods to raise means for their extremity." Again as in New York State, it has been held a protection for the poor to fix the maximum rate which can be exacted.

The power to legislate upon this subject is undoubted. "Two things," says Lord Bacon, "are to be reconciled. The one that the tooth of usury be grinded that it bite not too much; the other that there be left open a means to invite moneyed men to lend for the con-

tinuing and quickening of trade." "The principal error which has prevailed on this subject," says Chancellor Kent in *Dunham v. Gould*,¹ "is the condemnation of any interest, however small." Grotius concludes that a reasonable interest may be permitted, eight per cent in the ordinary and twelve per cent the mercantile, which latter, doubtless, was in view of maritime risks. *Non mordaces sed modice*, says another commentator, who admits that the *quantum* of interest belongs to the discretion of the lawgiver.

This rate varies in legislation, as it is unstable in the ways of commerce, fluctuating, it has been well said, not, as often supposed, by the extent of the supply of money, but by the variable rates of profit. The court adds in *Dunham v. Gould*, "Can we suppose that a principle of moral restraint of such uniform and universal adoption has no good sense in it? Ought we not rather to conclude that the provision is adapted to the necessity and the wants of our species, and grows out of the natural infirmity of man, and the temptations to abuse inherent in pecuniary loans?" This sentiment thus approved as the basis for the exercise of the power of government for protection of the weak and helpless, in the ordinary business transactions of life, has in former times overcome all opposition, and in the absence of express statute has been carried into and announced by the courts in their decisions as common law.

The control which the legislature is permitted to exercise over the business of the common carrier, is a survival of that class of legislation which in former times extended to the details of personal conduct, and assumed to regulate the private affairs and business of men in the minutest particulars. "It has survived in many instances because it was entitled to survive," is the remark of Mr. Justice Andrews in *People v. Budd*, and he goes on to state that: "By reason of the changed conditions of society and a truer appreciation of the proper functions of government many things have fallen out of the range of police powers as formerly recognized; the regulation of which by legislation would now be regarded as invading personal liberty. But society could not safely surrender the power to regulate by law the business of common carriers, etc.

In *Waddington's case* for forestalling, Lord Kenyon said: "The policy of the common law was to provide for the wants of the labor-

¹ 16 Johns. 378; Grotius, Lib. 2, chap. 12, §§ 20, 22; Heinec. Elem. Jur. Germ. lib. 2, tit. 13, § 378; *Buford v. Louisville N. R. R.*, 82 Ky. 286.

ing classes of the country, and if humanity alone cannot operate to this end, interest and policy must compel attention to it." Yet the varying and progressive sense of public policy and of the requisite protection for the public welfare cannot be better exhibited from one point of view, than in these three crimes of engrossing, forestalling and regrating, which have been said to still exist at common law, but they have disappeared from the statute books,¹ and no longer are subjects of prosecution.

Story says these three prohibited acts are not only practised every day, but they are the very life of trade, and without them all wholesale trade and jobbing must be at an end. And as to the questions raised under the plea of public policy, courts have wisely said that they were not well disposed to such arguments. It must, if admitted, be unquestionable.² Burroughs, J., declared of this question of public policy, "it is a very unruly horse, and when you once get astride it you never know where it will carry you." So Jessel, M. R., holds "it must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing more than another public policy requires, it is that men of full age and competent understanding shall have the fullest liberty of contracting, and that their contracts shall be held sacred and enforced by the courts of justice."³ Distinguished writers have maintained the same caution. Mr. Story says: "What constitutes public policy is difficult exactly to determine. It is, in its nature, un-

¹ Russell on Crimes, 1, chaps. 19, 168, 175; *Rex v. Waddington* (1800) for enhancing the price of hops, 1 East, 143, 157; 3 and 4 Edw. VI, chap. 21; 13 George III, chap. 71; 7 and 8 Vict. 24; 4 Blk. Com. 158; 3 Co. Inst. 196; Story on Sales, 1; Benj. on Sales, 515. Forestalling and regrating are offenses under laws of Illinois; see Ann. Stat., Starr & Curtis, vol. 3, p. 188, § 63.

² *Richardson v. Mellish*, 2 Bing. 242; Benj. on Sales, § 512, p. 468; *Hilton v. Eckersley*, 24 L. J. Q. B. 358; 6 E. & B. 47. In the State of New York and in other States are statutes against conspiracies injurious to trade. 2 R. S. 692, § 8; Pen. Code, 168; see *Leonard v. Poole*, 114 N. Y. 370. Retail coal dealers associating to keep up the prices for coal were convicted, and the judgment affirmed by the Court of Appeals; *People v. Sheldon*, 54 N. Y. St. R. 513.

³ *Printing and N. Co. v. Sampson*, 19 Eq. 465; *Rousillon v. Rousillon*, 14 Ch. D. at p. 365; Story on Sales, § 490, ed. 1871, p. 595; Benj. on Sales, § 489, p. 594; see *Millet v. People*, 117 Ill. 294; *Cooley on Const. Lim.* 393; *People v. Gillson*, 109 N. Y. 889, 898; *State v. Goodwill*, 33 W. Va. 179; *State v. Fire Creek, etc.*, Coal Co., id. 188; *Ex parte Kuback*, 85 Cal. 274; *People v. Marx*, 99 N. Y. 377; *Godcharles v. Wigeman*, 113 Penn. St. 431; *Com. v. Perry*, 28 N. E. Rep. 1026.

certain and indefinite, fluctuating with the change of habits and opinions, with the growth of commerce and with the enlargement of international intercourse. But the rule may safely be laid down that whatever contravenes an actual rule of policy, or which interferes injuriously with the true interests of society is against public policy."

Monopolies are much the same offense in other branches of trade, that engrossing is in provisions.¹ By the common law those who are guilty of this offense are subject to fine and imprisonment — the offense being *malum in se*, and in England it is said there are precedents of this kind in earlier times, and all points of this kind relating to any known trade are void by common law." They were carried to an enormous extent by grants from the crown in spite of their illegality, and abolished by 21 James I, chapter 31, except as to patents and to certain manufactures for the use of the government.

In the great case of the Monopolies the court held the plea of the defendant, who had disregarded the patent, good, and the grant void, and said: "All trades, as well mechanical as others, which prevent idleness, (the bane of the commonwealth) and exercise men and youth in labor for the maintenance of themselves and their families, and for the increase of their substance are profitable for the commonwealth, and, therefore, the grant to the plaintiff to have the sole making of them, is against the common law, and the benefit and liberty of the subject." This much-quoted expression finds frequent approval in our courts. On the other hand, the fair trader was equally protected by the common law against impositions in England, in virtue of this element of police power, exercised by the sovereign government for the benefit of the people. Thus in a reported case to punish the deceit and impositions practised to lower the price of wool in Coteswold — "presentment thereof being made, the defendants having appeared, were upon their confession put to fine and ransom."

Differently, however, in our American States have these questions been raised, and at the outset the principle having been admitted, as declared in the Constitution of some of our States, that "Monopolies are contrary to the genius of a free government and ought not to be allowed," it has been appealed to in defense against laws which, as

¹ 1 Russ. on Cr., chap. 19, 178; Bacon Abr., tit. Monopoly, note B; Hawkins on P. C., chap. 79; 3 Co. Inst. 81; 2 Co. Inst. 47, 61.

² 11 Cok. 85; see Slaughter-house cases, 16 Wall. 46; 3 Co. Inst. 196; 26 Edw. III, chap. 6; 18 Rich. II, chap. 8; Inter Leges Ethelstani, chap. 12; 1 Russ. Cr. 173; see Act of Congress, July 2, 1890.

they embodied or violated it, have been upheld or declared unconstitutional and void.¹ In the Slaughter-house cases the dissenting opinion of Mr. Justice Field, concurred² in by the Chief Justice and Judges Swayne and Bradley, rests principally upon the assumption that "the reasons given for the judgment in the case of Monopolies apply with equal force to the case at bar." In *People v. Budd*,³ the court says: "We rest the power of the legislature to control elevator charges, on the nature and extent of the business, the existence of a virtual monopoly, etc." It is only as involved in the determination of the constitutionality of legislation that this enters into our discussion.

We shall not find indictments and prosecution for monopoly *eo nomine* in our reports of this day. The argument took new life under the thirteenth and fourteenth amendments to the Constitution of the United States, and especially, that the grant of exclusive privileges for any purpose, by a State, was in violation of this section. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

This last phrase has been as much disputed as that of the Magna Charta "*vel per legem terræ*." It has been frequently the subject of interpretation by the courts and in recent cases⁴ in the United States Supreme Court has been authoritatively construed, but the criticism was made very early of the rule against monopolies, that it would seem to restrain the legislature from encouraging the introduction of hazardous and expensive experiments in some art, science⁵ or business. A temporary monopoly of that kind, says Adam Smith, may be vindicated upon the same principles upon which a like monopoly of a new machine was granted to its inventor, and that of a new book to its author." The State of New York, from 1798 to 1811, actuated by such considerations, had granted the exclusive right of using and navigating boats by steam in the waters of the State for a term of

¹ See Constitution of Maryland, North Carolina, Tennessee, Mississippi, Ohio, Illinois; 1 Kent Com. 609, note.

² 16 Wall. 102.

³ Opinion of Andrews, J., 117 N. Y. at p. 27.

⁴ *Walling v. Michigan*, 116 U. S. 446; *Strauder v. West Virginia*, 100 U. S. 303; *Elk v. Wilkins*, 112 U. S. 94; *Mugler v. Kansas*, 123 U. S. 623; *Pembina Cons. Silver Mining Co. v. Pennsylvania*, 125 U. S. 181; *Leisy v. Hardin*, 135 U. S. 100.

⁵ 1 Kent Com., Part IV, 11, note p. 608.

years to John Fitch, Robert R. Livingston, Robert Fulton and their associates or representatives, and the Court of Errors of that State held the acts were constitutional and valid; but a different view was taken in the Supreme Court, because the grant was repugnant to the rights and privileges conferred by the United States under its power to regulate commerce.¹

These two questions were elucidated in the decision of the United States Supreme Court in the Slaughter-house cases, viz., that of a monopoly, and the right of a State to grant exclusive privileges in any business.

Mr. Justice Miller, in the opinion² of the court, says: "The records show that the plaintiff in error relied upon and asserted, throughout the entire course of the litigation in the State courts, that the grant of privileges in the charter of the defendant, which they were contesting, was a violation of the most important provisions of the thirteenth and fourteenth articles of amendment of the Constitution of the United States. The jurisdiction and the duty of this court to review the judgment of the State court on those questions is clear and imperative."

* * * The statute is denounced not only as creating a monopoly and conferring odious and exclusive privileges upon a small number of persons at the expense of the great body of the community of New Orleans, but it is asserted that it deprives a large and meritorious class of citizens, the whole of the butchers of the city, of the right to exercise their trade, the business to which they have been trained and on which they depend for the support of themselves and their families; and that the unrestricted exercise of their business of butchering is necessary to the daily subsistence of the population of the city."

The wisdom of the monopoly granted by the legislature may be open to question, but it is difficult to see a justification for the assertion that the butchers are deprived of their right to labor in their occupation. * * * The privileges and immunities relied on in the argu-

¹ *Livingston v. Van Ingen*, 9 Johns. 507; *Gibbons v. Ogden*, 9 Wheat. 1.

² 16 Wall. 36; see, also, *New Orleans Gas Co. v. Louisiana L. Co.*, 115 U. S. 650; see, also, *Norwich Gas L. Co. v. N. City G. L. Co.*, 25 Conn. 19; *City of Chicago v. Rumpff*, 45 Ill. 90; *Mayor, etc., v. Thorne*, 7 Paige, 261; *Ward v. Maryland*, 12 Wall. 419. "In granting an exclusive franchise to supply water to one of its cities the legislature of a State does not part with the police power and duty of protecting the public health." *Stein v. Bienville Water Supply Co.*, 84 Fed. R. 145; affirmed, 141 U. S. 67; and see *Western Union Tel. Co. v. City of New York*, 38 Fed. R. 552; *City of Vincennes v. Citizens Co.*, 132 Ind. 114.

ment are those which belong to citizens of the State as such, and they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government. etc. The power here exercised by the legislature of Louisiana is in its essential nature one which has been, up to the present period in the constitutional history of this country, always conceded to the States however it may now be questioned in some of its details. We think it may be safely affirmed, that the Parliament of Great Britain and the legislative bodies of this country, have from time immemorial to the present day continued to grant to persons and to corporations exclusive privileges denied to other citizens, privileges which come within any just definition of the word monopoly, as much as those now under consideration, and that the power to do this, has never been questioned or denied. Nor can it be truthfully denied that some of the most useful and beneficial enterprises set on foot for the general good, have been made successful by means of these exclusive rights, and could only have been conducted to success in that way."

Again in a subsequent case when establishing the doctrine that the power of the State legislature to make a contract not to be modified or abrogated, does not extend to subjects affecting public health and morals, the concurring opinion sustained the decision, that the State could annul the monopoly features of the original act,¹ and Justices Field and Bradley reaffirmed their dicta, that it was an incontrovertible proposition of both English and American public law that "all mere monopolies are odious and against common right." It is sufficiently evident that mere monopolies are illegal, but that for certain objects and in a reasonable way exclusive privileges may be granted in subjects affecting public health or public morals, and the public welfare.

Other examples of the constitutional grant of exclusive privileges may be found of very early date, as well as in cases growing out of new necessities of society. The distinction is also made between virtual or practical monopoly, and legal monopoly, both subject to regula-

¹ *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 760, 761; *New Orleans Gas Co. v. Louisiana L. Co.*, 115 U. S. 650; and *Met. Board of Excise v. Barrie*, 34 N. Y. 657; see opinion of Mr. Justice Field, 16 Wall. 110; and note and edict of Louis XVI of France, in 1776, giving freedom to the States. "It was the allurement of these fiscal advantages, undoubtedly, that prolonged the illusion and concealed the immense injury to industry. This illusion had extended so far that some persons asserted that the right to work was a royal privilege which the King might sell." *People v. Sheldon*, 54 N. Y. St. R. 518, N. Y. C. A.

tion. Thus as to ferries, Lord Hale says: "No man may set up a common ferry for all passengers without a prescription time out of mind or a charter from the King, and every ferry ought to be under a public regulation, viz.: "That it give attendance at due time, keep a boat in due order and take but reasonable toll."¹ And in *Aldnutt v. Inglis*,² Lord Ellenborough says: If the public have a right to resort to premises and make use of them, and one "will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms."

Turnpikes, again, are roads owned by private persons,³ over which the public has a right of passage, upon the payment of tolls to the owner. The primary purpose in conferring corporate franchises upon them, is to subserve the public welfare, but the police power exists over all public roads, and franchises are conclusively presumed to be acquired with reference to its existence. A recent writer⁴ has said as to bridges, "If, as some of the cases suggest, the authority to regulate bridges is a branch of the police power, it would seem to follow that it is exclusively a State power."

The question of tolls, however, is suggestive of a monopoly, and as to the right to erect a bridge the distinction between the Federal and the State control is clearly marked by Mr. Justice Bradley, in the case of the *Williamette Iron Bridge Co. v. Hatch*,⁵ wherein it is stated that obstructions and nuisances are offenses against the laws of the States within which the navigable waters lie, but are not offenses against United States laws which do not exist, and that the Passaic river, though navigable for a few miles within the State of New Jersey, and therefore a public river, belongs wholly to that State. It is no highway to other States. No commerce passes thereon from States below the bridges to States above." Chief Justice Ruger in *People v. Squire*,⁶ in reference to the law of the State of New York providing for placing electrical conductors underground, and for commissioners

¹ *De jure Maris*, 1 Harg. L. T. 6; see *Laws N. Y.* chap. 692; *Pen. Code*, § 416.

² 18 East, 537.

³ *Seneca Road Co. v. Auburn R. R. Co.*, 5 Hill, 170; *Elliot Roads & B.* chap. IV, page 53.

⁴ *Elliot Roads & B.* p. 27, note.

⁵ 125 U. S. 1-17; see 3 Wall. 721, 792; *Pound v. Turck*, 95 U. S. 459; *Escanaba Co. v. Chicago*, 107 U. S. 678; *State v. Sargent*, 45 Conn. 373.

⁶ 107 N. Y. 602; see *West. Union T. Co. v. City of New York*, 38 Fed. R. 552; see *N. J. Stat.* 1892, respecting subways.

of electrical subways, when a case arose occasioned by the exclusive rights granted by such commissioners to construct such subways, and a writ of mandamus was applied for, on the part of the relator, who had been incorporated for the purpose of constructing and maintaining electric conductors to be placed under the streets in the city of New York, delivering the opinion of the court, that the claim could not be maintained, and that mandamus was properly denied, assigned, among other reasons, that: "The necessity of these acts spring out of a great evil, which in recent times has grown up and afflicted large cities, by the multiplication of rival and competing companies, organized for the purpose of distributing light, heat, water, the transportation of freight and passengers, and facilitating communication between distant points, and which require in their enterprises not only the surface and air above the streets, but indefinite space underground. * * * These works not only called for great skill, to harmonize the various and conflicting claims of competing companies, but a comprehensive plan and supervision." "Every holder of property, however absolute and unqualified may be his title, holds it under the implied liability it shall not be injurious to the rights of the community." Street railroads have certainly a practical monopoly, which is unquestioned, except as subjected to the necessary regulation.

These cases certainly present some features of monopoly, and yet they are not true cases under such title. The conditions of a public nature observed in them distinguish them from the private monopoly condemned by the courts, and the right to take tolls has sometimes been explained, as only another form of taxation for a public benefit acquired, and a public use obtained at private, instead of the public expense. So also with regard to railroads, argument has been made that their regulation is dependent, to large extent, upon the conditions both fixed and implied in their charters. This cannot be admitted, for the police power cannot be surrendered,¹ and in its proper exercise, there is no estoppel against the public authority, as has been frequently decided with respect to various topics, and different subjects. More

¹ *Butchers' Union Co. v. Crescent City*, 111. U. S. 746; *People v. Boston & Albany R. R.*, 70 N. Y. 569; *Coates v. Mayor*, 7 Cowen, 585; *Corporation of the Brick Pres. Church v. The Mayor, etc.*, 5 Cowen, 538; *Boyd v. Alabama*, 94 U. S. 645; *Moore v. State*, 48 Miss. 147; *Met. Board of Excise v. John Barrie*, 34 N. Y. 657. *Beer Company v. Mass.*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, 97 U. S. 639. *Stone v. Miss.*, 101 Miss. 814; *R. R. Commission Cases*, 116 U. S. 807.

over the requirement of cattle-guards at the railroad has been held to be an exercise of police power,¹ both "as a proper security for the lives of domestic animals, which forms a proper sphere of legislation," and "a reasonable security to others against a dangerous business, which the legislature may justly require." "In England all farm crossings are required to be above or below grade." The same mandatory power is used toward railroads in respect to transportation at prices frequently limited by law, that it receive and carry, at reasonable times, passengers and freight, with proper precautions respecting articles of a dangerous character, and even the location of stations is sometimes regulated.

"Although a railroad corporation may be a private one, yet its work is public as much as if the road were constructed by the State" has been said, and this intervention, whereby property, in some respects *privati juris*, has a public servitude imposed with consequent obligations extends to cases where, except for peculiar or perhaps temporary exigencies, no public use could be assumed. It is as when to escape a foundering road the traveller on the highway uses the ancient right of passing by in the bordering field, keeping close to the road, doing as little injury as possible, and avoiding trespass. This is a rule for the general good, as stated by Lord Mansfield, but as stated by the Supreme Court of Vermont, "The interference with private property is

¹Thorp v. Rut. & Bur. R. R. Co., 27 Vt. 140; Cootman v. Central R. R., 1 Kelly (Ga.), 173; and as to bridges, see 70 N. Y. 569; Waldron v. R. & S. R. R., 8 Barb. 390; Milliman v. Oswego & S. R. R., 10 Barb. 87. As to depots and waiting rooms, State v. Kansas City, Fort S. & G. F. R. Co., 33 Fed. R. 722; State v. Railway Co., 83 Mo. 144; Laws of Missouri, 1881, p. 77, and Laws of New York, 1890, chap. 565; as to grade crossing, Mass. Stat. 1892; as to limitation of prices, Chicago, B. & Q. R. R. v. Iowa, 94 U. S. 155; Dow v. Beidelman, 125 U. S. 680; "but a law which allows a railroad commission to establish rates for railroads which are final, without issue made, or inquiry had, as to their reasonableness, and forbids the courts to stay the hands of the commission, if the rates established by it are unreasonable and unequal conflicts with the Constitution of the United States." Chicago, Mil. & St. P. R. R. v. The State of Minn., 134 U. S. 418. It has been several times decided that hostile State legislation which compels railroads to do business at a loss and prevents them from paying interest on their bonds is invalid. Railway Co. v. State, 49 Ohio, 189; see Colorado law, sustained in Un. Pac. R. R. v. Goodridge, U. S. Sup. Ct., May 15, 1898, No. 16 Adv. Sh., p. 874; and Contra, Hoover v. Pa. R. R., July, 1893, 27 Atl. R. 282; Ransome's case, 1 C. B. (N. S.) 437, 454; Nicholson v. Railway, E. C. L. 866; 17 and 18 Vict., 81.

obviously dictated and justified *summa necessitate*, and by a due regard to the public safety or convenience."¹

In like manner a levee may be raised on private land, and in some cases an owner of land is himself required to build and maintain a levee.² The law of Massachusetts which imposes a penalty on any person who shall take, carry away or remove any stones, gravel or sand from any of the beaches in the town of Chelsea³ was passed for the purpose of protecting the harbor of Boston, and extends as well to the owners of the soil as to strangers," says the court, and Chief Justice Shaw adds that the statute of 1845 "is a mere revision of a former statute of 1798, the only change being 'in substituting an indictment for a *qui tam* action as a mode of punishment.'" In *Bancroft v. Cambridge*, the law of 1872, authorizing the city of Cambridge to order owners of land to fill them to a certain grade to abate a nuisance, and providing that on their failure the mayor and aldermen might go in to fill and grade, and the expense should be a lien on the land, was held to be constitutional. Laws requiring drowned and swamp lands to be drained are numerous, and in many States the improvement of property at the expense of the owners may be and is required by law.

¹ *Taylor v. Whitehead*, 2 Doug. 744; 3 Blk. Com. 36; *Morey v. Fitzgerald*, 56 Vt. 437; *Elliott R. & B.*, p. 8, notes. This right of passing is strictly construed in *Harrison v. Duke of Rutland*, Eng. Ct. of Appeals, December 8, 1892; 68 L. T. R. (N. S.) 35. The defendant was owner of a moor, and on the day on which the alleged cause of action arose was lawfully engaged thereon with a party of friends shooting grouse. Across the moor ran a public highway, and the plaintiff, for the sole purpose of annoying the defendant, went on to the highway and tried, in various ways, to disturb the grouse, which were being driven across the road in the direction of the butts, where the defendant and his friends were stationed. The plaintiff refused to desist, and thereupon keepers of the defendant, by his orders, held the plaintiff down on the ground till the drive was over. In an action for assault and false imprisonment, held, that plaintiff was a trespasser and could not recover. The court, by the Master of Rolls and Lopes and Kay, L. J., define the only legitimate use of the highway is in passage. "The right of passing and repassing, and that the trespass consisted in exceeding this use for the purpose of infringing the rights of the owner of the soil." As to laws respecting logs cast or lodged upon littoral lands, see *Henry v. Roberts*, 50 Fed. R. 902; *Harrigan v. Lumber Co.*, 129 Mass. 590; *Scott v. Wilson*, 3 N. H. 321; *Craig v. Kline*, 65 Penn. St. 399; *Littlefield v. Maxwell*, 31 Me. 184. As to ferries and right to land a boat without consent of riparian owner, *Buford v. Smith*, 21 S. W. R. 168; Texas Court of Appeals, Jan. 31, 1893, and cases cited; 21 S. W. Rep. 163.

² *Bouligny v. Dormenon (La.)*, 2 Martin (N. S.), 455; Acts of Louisiana on Subject of Levees. Laws 1807, 1813; Mills on Em. Dom., § 7.

³ *Com. v. Tewksbury*, 11 Metc. 55; Stat. Mass. Laws 1845, chap. 1171; see Laws 1846, chap. 206, repealing it in part; Laws 1798, 2 Sp. Laws, 283. This case is cited in *Bancroft v. Cambridge*, 126 Mass. 141; also in 144 Mass. 530; *Snider v. City of St. Paul*, 53 N. W. R. 763.

This compulsory right of interference with private property by statute is more certain than its explanation, or its conditions, in the decisions of the several States. Unquestionably it belongs to the police power, and must be exercised for a public object,¹ and it does not belong to the common law, but has arisen almost universally from the new exigencies of the extending lines of population, and the public service for which the legislature, in its wisdom, makes provision by statute.

The U. S. Supreme Court,² in *Davidson v. New Orleans*, has discussed several of the questions involved, but is content to affirm the judgment of the State court, upholding the constitutionality of the statutes, under which a personal judgment was rendered against the owner of swamp lands for the assessment laid for their drainage, while it also made it a charge upon the land.

In New York State, a somewhat similar statute was passed, April 4, 1806, but was changed, April 12, 1816, making the lands liable alone for the expenses which were to be apportioned in proportion to the benefit received. This law and the act of March 6, 1807, "to raise moneys to drain the drowned lands in the county of Orange," to apportion the expenses according to the acreage, and giving authority to sell the lands if the sum apportioned was not paid by the owners, were sustained³ by Chancellor Walworth. But in several cases the constitutionality of such acts was questioned, and in *Hartwell v. Armstrong*,⁴ it was held by Mr. Justice Bacon, that "assessments upon the several owners of lands drained, according to the number of acres respectively owned by each, was not the just compensation contemplated and required by the Constitution."

¹ *Donnelly v. Decker*, 58 Wis. 461; *Norfleet v. Cromwell*, 70 N. C. 634; *Anderson v. Kerns*, 14 Md. 199; *O'Reilly v. Kankakee Val. Draining Co.*, 82 Ind. 69; *Draining Co. Cases*, 11 La. Ann. 838; *Williams v. Mayor of Detroit*, 2 Mich. 560; and see 126 Mass. 138; 100 Mass. 544; see U. S. v. *Alexander* and U. S. v. *Truesdell*, 149 U. S. 186, 196. "The right to destroy one's own," is the subject of litigation in *Hague et al. v. Wheeler* (Pa. Sup. Ct.); 27 Atl. R. 714; where an injunction was sought against allowing natural gas to escape from an open well on the land of the defendant, who preferred this course to using it. As to county ditch, see *Yeomans v. Riddle*, 84 Iowa, 147.

² *Davidson v. New Orleans*, 96 U. S. 97; *Hadgar v. Supervisors*, 47 Cal. 222; *French v. Kirkland*, 1 Paige, 117; *Hartwell v. Armstrong*, 19 Barb. 166.

³ 1 Paige Ch. *French v. Kirkland*, 117; *Phillips v. Wickham*, 590.

⁴ 19 Barb. 46; *Woodruff v. Fisher*, 17 Barb. 224; *Matter of draining certain swamp lands*, 5 Hun, 116; see *Contra*, *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; affirmed, 8 Mo. App. 548.

In *Woodruff v. Fisher*, Mr. Justice Hand held that owners of wet lands are not guilty of a public nuisance because they neglect to drain, and questioned the force of a statute to compel drainage, but in 1878, the Court of Appeals of this State reviewed the whole matter, and sustained the constitutionality of the General Drainage Act¹ of 1869, with this statement: "the power of the legislature to enact these Drainage Acts has been put by some courts on what is said to be a right to prescribe public regulations for the more economical management of property of persons whose lands adjoin, or which for some reason can be better managed and improved by some joint operation (*Coster v. Tidewater Co.*, 18 N. J. E. 54; *O'Reilly v. Kankakee Draining Co.*, 32 Ind. 69). We do not wish to rest on such a proposition. It is better, we think, to place it on the right to take private property for public use, making due compensation therefor; and to declare that to take, for the maintenance and promotion of the public health is a public purpose. It will be seen from a scrutiny of the act of 1869, that the object for which drainage may be had by its provisions is solely the public health."

This ruling has been followed in the State of New York, but seems to confuse the right of eminent domain and the police power which rests upon the law of necessity for the public good. It, however, has been somewhat limited by the statement in other cases, that lands cannot be permanently appropriated for drains for the benefit of other lands,² without compensation. The analogy also is drawn from the law of taxation, while if we follow the essential principle governing all cases which strictly belong to our subject, we shall find that as in their origin, so now, they are not generally held to be dependent upon compensation.

Another ground has been assumed, that the duty of drainage may be constitutionally imposed, because of the consequent increase in the value of the land drained, but the courts are careful to avoid measuring the extent of the drainage by the increase of value, or the value of the improvement of the lands.³ In New Jersey, however, the assessment is so limited, and any assessment above the amount of the special benefit imparted to the lands by drainage has been held uncon-

¹ *Matter of Ryers*, 72 N. Y. 1, p. 7.

² See *Moore v. City of Albany*, 98 N. Y. 396; *Matter of Petition of Cheeseborough*, 78 N. Y. 232.

³ *The People v. Mayor*, 4 N. Y. 419; *Davidson v. New Orleans*, 96 U. S. 97; *Matter of Ryers*, 72 N. Y. at p. 8.

stitutional.¹ This, however, must leave room for the right of eminent domain, or to condemn lands for the public welfare, in case the assessment will not provide for the necessary abatement of a dangerous nuisance. "There can be no doubt," says the Massachusetts Supreme Court in *Train v. Boston Disinfecting Co.*,² "of the right of the legislature to pronounce under its police power certain things or certain acts nuisances in themselves. Nor are such laws obnoxious to any constitutional provision, because they do not provide compensation to the individual, whose liberty to keep them is restrained," and the same court in *Carleton v. Rugg*,³ stated that "in our State the right to proceed in equity to abate public nuisances, and to destroy private property in the exercise of police power, when necessary for the protection of the public, has been recognized in many cases."

In Wisconsin the Drainage Acts⁴ were upheld, and the whole cost imposed upon the owner, and this rule Prof. Tiedeman in his work on Limitations of Police Power says has been followed in most of the States, and he has cited many cases. The same author states as a logical sequence, and very forcibly, the inherent difficulty in the attempt to equitably adjust private rights of property, and the rule of public necessity, upon a scale of proportionate benefits, injury and compensation, as follows: "It is as much a violation of the rights of property to compel the owner to pay for the improvement of his land, which he did not order, and does not want, as to impose on him the entire cost of removing a natural nuisance, which it was not his duty to abate." This is upon the ground stated by Mr. Justice Hand in *Woodruff v. Fisher*, that "the owners of wet lands are not guilty of a public nuisance because they neglect to drain them."⁵ It is difficult to see what property the State acquires, if it does not take the land, and equally difficult, is the application of another principle to which refer-

¹ In the Matter of Drainage along Pequest River, 41 N. J. L. 175; *Tidewater v. Coster*, 45 N. J. L. 91. "The cost of a public improvement may be imposed on the property peculiarly benefited, but the cost beyond this measure must be levied from the public at large." See, also, *State v. Driggs Drainage Co.*, 45 N. J. L. 91.

² 144 Mass. 528; see 97 U. S. 669.

³ 149 Mass. 530.

⁴ *Donnelly v. Decker*, 53 Wis. 461; *Treatise on the Limitations of Police Power*, § 124; see *Shelley v. St. Charles County*, 17 Fed. R. 909, in which McCrary, J., says "such laws are very generally held valid" and cites *Cooley's Taxation by Special Assessment*, chap. 20; and *Gilchrist v. Little Rock*, 1 Dill. 261.

⁵ *Id.* 447.

⁶ 17 Barb. 225; *O'Reilly v. Kankakee Valley D. Co.*, 32 Ind. 169.

ence has been had, in the motto, *Sic utere tuo ut alienum non laedas*, because in many instances the lands are in their natural state, and unused. Therefore, the simple and exclusive power, ratified by many decisions existing in every State, to regulate all property as shall be found necessary for the public welfare, without acquisition and without compensation, is the foundation of the prevalent rule in the drainage cases. It is also to be remembered, that when the first issues were framed upon this question, the laws and requirements of sanitary administration, were not so well understood as at the present time, and it may be that the principle of *Donnelly v. Decker* is more conformable to them.

The confusions from appeals to various explanations, and reasoning upon the source, from which springs the admitted regulation of private property by and for the public interests, is illustrated by opinions on eminent domain such as expressed by Mr. Mills,¹ that "there seems to be a power in the legislature other than that of eminent domain, by which the enjoyment of private property is controlled, without the consent of the owner, and without compensation to him. There are regulations for the better and more economical management of the property of adjoining owners. Instances are named of party walls,² foundations of buildings, division fences, the usufruct of water, control over the servitudes and vicinage and easement rights, including the right of passage over land and the easement of access, the height of buildings and regulation of light, air, and ventilation, of adjoining owners from a public alley or street.

The New York and Massachusetts statutes, which gave compensation under certain limitations, for buildings in the path of a fire, and razed to stay the conflagration, were strictly construed as being in derogation of the common law.³ Other property taken and destroyed or impaired in value by operation of law, by virtue of overruling necessity, and for

¹ Mills Em. Dom., § 9.

² 3 Kent Com: 535 *seq.*; *McCoy v. Grundy*, 3 Ohio St. 463; *Elliot R. & B.* 19, 20, 526, 527; *Hamilton v. Chicago Co.*, 124 Ill. 241; *Marseilles v. Howland*, *id.* 551; *Dexter v. Tree*, 117 Ill. 535; *Green v. Swift*, 47 Cal. 536; *People v. Hawley*, 3 Mich. 330; In the Matter of N. Y. El. R. R., 36 Hun, 427; *Story v. N. Y. El. R. R. Co.*, 90 N. Y. 122; *Child v. Chappell*, 9 N. Y. 246; *Leprell v. Kleinschmidt*, 113 N. Y. 364.

³ *Taylor v. Plymouth*, 8 Metc. 462; *Mayor of New York v. Lord*, 18 Wend. 126; *Russell v. Mayor*, 2 Denio, 461; *Stone v. Mayor*, 25 Wend. 157.

the public welfare, has not been construed as taken for public use,' but under a penalty, and hence to require no compensation. When the property in its use is noxious to the public, the injury is prevented, but no benefit or profit is taken, and it has been said the owner may be presumed to be compensated as one of the public, and by his share of the advantages arising from such beneficial regulations.' The legislature is within its rightful province in passing such laws, and there is much authority to support any conditions which it may prescribe for the public dominant servitude, if this phrase may be used and in like manner in respect to personal property. Cattle exposed to, or affected by pleuro-pneumonia, horses by glanders or farcy, sheep and hogs with their contagious diseases, and cows with tuberculosis, may be ordered killed, or may be seized and destroyed, and in its clemency the government provides a payment to the owner.'

The wisdom as well as the power of the legislature is to be presumed, and it has been repeatedly decided that although legislation may be unwise, the appeal must be to the legislature or the ballot-box, not to the judiciary.' An instructive opinion on this phase of the question, is that of the Supreme Court of Connecticut, in *Booth v. Town*¹ of Woodbury, respecting the right to appropriate gratuities to men liable to be drafted, and properly drafted to military service. "It is not contrary to natural justice," says the court, "that the inhabitants should

¹ *The State v. Snow*, 3 R. I. 64; *Mills Em. Dom.*, §§ 4, 5, 8; *Beer Co. v. Mass.*, 97 U. S. 25; *Mugler v. Kansas*, 123 U. S. 623; *People v. Hawley*, 3 Mich. 330; *Guillotte v. New Orleans*, 12 La. Ann. 432; *Racey v. Phelps*, 60 N. Y. 10; *Blazier v. Miller*, 10 Hun, 435; *Met. Bd. of Excise v. John Barrie*, 34 N. Y. 657; *Green v. Swift*, 47 Cal. 536; *Green v. State*, 73 Cal. 29; *id.* p. 125, *Lamb v. Reclamation Dist.*

² *Mills Em. Dom.*, § 7; *Baker v. Boston*, 12 Pick. 184; *Com. v. Alger*, 7 Cush. 53; *St. Louis v. Stern*, 3 Mo. App. 48. "Where there is no taking the owner of the franchise cannot have compensation, although there may be some consequent injury. *Elliot R. & B.* 166, note; *Moses v. Sanford*, 11 Lea, 731; *Pittsburgh, etc., Co. v. Jones*, 111 Penn. St. 204.

³ U. S. Act of Aug. 30, 1890, 26 Stat. L. 414, § 8, R. S. Supp. 794; N. Y. St. L. 1884, chap. 418, § 2; L. 1888, chap. 53, § 1; L. 1892, chap. 487.

⁴ *Parker v. State ex rel.*, 132 Ind. 419; *Powell v. Pa.*, 127 U. S. 678; *Dow v. Beidelman*, 125 U. S. 680; *People v. Budd*, 117 N. Y. at p. 29. But hostile and discriminating legislation by a State against persons of any class, sect, creed or nation, is forbidden by the Constitution and cannot interfere with the treaty rights of the Chinese, or prevent them working for a living, or exclude them from landing or remaining. See Cal. Const., art. XIX and 8 Pac. C. L. J. pp. 413, 472; *Baker v. City of Portland*; *Ho Ah Kow v. Nunon*; *Chapman v. Toy Long*, 4 Saw. 28; see Chinese Exclusion case, 130 U. S. 581; *Yick Wo v. Hopkins*, 118 U. S. 356.

⁵ 32 Conn. 118; *Norman v. Kentucky Bd. Man. W. C. Ex.*, 20 S. W. R. 901.

be taxed for such gratuities (or bounties), because the burden should be shared by all," and "if it is possible that the gift will be promotive in any degree of the public welfare, it becomes a question of policy, and not of natural justice, and the determination of the legislature is conclusive." In the Matter of the Appropriations for the World's Fair, the Kentucky Court of Appeals said: "If the people desire this appropriation made, the legislature will doubtless do so, but nothing connected with the matter is more important to all, than that it shall be done according to law." This is a "referendum" as by the New York Court of Appeals, in *People v. Budd*, in the statement that "there is a remedy at the polls, if at the bottom legislation has been oppressive or unjust." With this passive result the courts have not always been satisfied.

It were difficult to see on what other ground than of this last conclusive presumption some of the labor laws and holiday laws of the State could be defended if assailed by one whose rights of contract were specially invaded. As in respect to interest, in the absence of contract the hours of labor may be regulated, and the freedom of contracting be still left to the parties,¹ except in the case of infants and women under the Factory Acts, which have long since been accepted as necessary and proper in England and the United States. But the "Anti-Truck" laws to prevent the payment of labor in scrip or goods, such as several States, including Illinois and Ohio, West Virginia and Pennsylvania, have enacted, must pass another scrutiny.

It was held in *State v. Goodwill*, in respect to a statute of West Virginia,² that it was unlawful to issue, for the payment of labor, any order or other paper whatsoever, unless the same purports to be redeemable for its face value in lawful money of the United States, bearing interest at a legal rate made payable to employee or bearer, and redeemable in thirty days, that this is equally an encroachment both upon just liberty and rights of the workman and his employer for the legislature to interfere with the freedom of contract between them, as such interference hinders the one from working at what he thinks proper, and at

¹ See Ohio R. S., § 4865; *id.*, § 7015. In some respects the law of New York State, chap. 711 of 1892, seems to pass this limit.

² Act of Ill., May 28, 1890, "Anti-Truck Law." *State v. Goodwill*, 33 W. Va. 179; *State v. Fire Creek Coal Co.*, *id.* 188; *Braceville Coal Co. v. People*, Ill. Sup. Ct., Oct. 26, 1893; 85 N. E. R. 62, holds that the law requiring weekly payments of wages by corporations is unconstitutional. *Frorer v. People*, 141 Ill. 171; *Godcharles v. Wigeman*, 113 Penn. St. 431; *Ramsey v. People*, 142 Ill. 380; *Parker v. State*, 132 Ind. 419.

the same time prevents the other from employing whom he chooses. And in *Frorer v. People*, it was held that a statute of Illinois, which declares it unlawful for any person engaged in mining or manufacturing business to engage, directly or indirectly, in keeping a truck store for the furnishing of supplies, tools, clothing, provisions or groceries to his employees, etc., is unconstitutional as depriving persons of property rights without due process of law.

A similar ruling was made in Pennsylvania, and in Massachusetts a statute providing that "no employer shall impose a fine upon, or withhold wages, or any part of the wages of an employee at weaving, for imperfections that may arise during the process of weaving," was declared to violate fundamental principles of right expressly recognized by our Constitution.¹ To the same effect are the decisions in the State of New York of *People v. Gillson*, in respect to a statute prohibiting gift or prize sales, and *Matter of Jacobs* respecting the manufacture of cigars in tenement-houses. Restrictions upon the use of buildings for the protection of health, decency and morality which do not violate these principles are to be judged from another standpoint, and such as are found in the Factory Acts relative to the employment of women and children, the Sanitary Code of New York, and the sanitary regulations of similar authority are maintained without difficulty.² Mr. Just-

¹ *Godcharles v. Wigeman*, 118 Penn. St. 431; *Com. v. Perry*, 28 N. E. R. 1026; *Ex parte Kuback*, 85 Cal. 274; *Frorer v. People*, 141 Ill. 171; *People v. Gillson*, 109 N. Y. 389; In *Matter of Jacobs*, 98 N. Y. 98. See Mass. Stat. 1892, respecting the weaver's fines for imperfections in their work first exhibited to them. *Contra* and sustaining special legislation of this character, *State v. Loomis*, Mo. Sup. Ct. 1892; 20 S. W. R. 332.

² See Code of Virginia, §§ 982, 984, 6773, 4320; R. I. Pub. Stat. 438, 439; Wisconsin R. S., §§ 4390a, 4575a, 1636c, 1728a, 1021g; Pennsylvania Brightley Purdon's Digest, 1883, pp. 771, 772, 1304, 1306; Supp. 1899-91, 2448; Ohio R. S., §§ 6966, 7692, 7694, 7696, 2128-30, 2449-54; Illinois Stat., Starr & Curtis, vol. 3, pp. 188, 192, § 68; See English Factory Acts Extension Acts 1864, 1867 and Factory and Workshop Act of 1874, cited *supra*; In Mass. Rev. Pub. Stat. (Rev. 1882), pp. 317, 322, 422, 443, 560, 563, Laws 1891, 1892; Conn. Gen. S., title XXXVII, §§ 3263-72, 2108, 2645-7, 2623-9; Other State laws, S. V. Factory and Inspection, New York Laws 1892, chap. 673; Laws 1892, chap. 655; San. Code of Health Dept., city of New York, §§ 17-23; N. J. Laws 1892. New York and Massachusetts have passed laws to regulate the manufacture and sale of clothing made in unhealthful places, directed against the so-called "Sweating System." See chap. 655, N. Y. 1892. The Massachusetts Statute, 1892, requires a license to be obtained and a label to be used with the words "Tenement-made." The New York Statute requires a permit and a tag giving the State and town where the articles were made. These laws have yet to pass the test of the courts. *Com. v. Crowell*, 156 Mass. 215.

ice Andrews has said in *People v. Budd*: "The legislature may transgress the principles of the Constitution. It has done so in the past, and it may be expected that it will sometimes do so in the future. But unconstitutional enactments have generally been the result of haste or inadvertence, or of transient and unusual conditions in times of public excitement, which have been felt and responded to in the halls of legislation. The framers of the government wisely interposed the judicial power, and invested it with the prerogative of bringing every legislative act to the test of the Constitution."

Laws regulating mining do not properly come into our subject as they are established, and from ancient times have been so, and form a distinctive subject in legislation or administration, equally with the common law and civil law provisions, concerning real estate and domestic relations, or the laws and regulations of the peace and of the criminal branch of government which are and should be classed by themselves and not as belonging to police powers. An exception may be made of the laws requiring two outlets, or one up and one down shaft, for the ventilation of the mine and safety of the miners, which more nearly approaches sanitary legislation.¹

Laws requiring persons to cut down weeds twice in each year and owners and occupants of land to cut down and destroy Canada thistles,² weeds, briars and brush, are legitimate parts of this subject, and are both necessary for the public welfare. They have lately been extended to diseases of trees, and the legislature of New York has passed "An act to prevent the spread of the disease in plum, cherry and other trees known as the black knot." The owner or person in charge of such trees is required to remove and destroy by fire every tree or part of a tree found to be infected and marked or girdled by the commissioners appointed under the act, or he shall be deemed guilty of a misdemeanor, and it becomes the duty of the commissioners to remove and destroy such trees. A similar law applies to peach trees, almond, apricot or nectarine trees infected with the contagious disease known as the Yellows," and declares both tree and fruit public nuisances, subject to destruction, and prohibits sale of the fruit. The allowance in taxes in several States, for planting shade and fruit trees on the high-

¹ Laws New York State 1892, chap. 667.

² See Laws New York, 1847, chap. 100; 1881, chap. 296; 1878, chap. 49; Illinois Laws 1871-2, p. 210.

³ New York Laws 1887, id. 1869, chap. 322; 1870, chap. 595; 1883, chap. 371.

way, is an example of a reasonable gratuity intended to secure service for the public welfare.¹ An allowance is also made for the erection of street lamps.

The right to ply a trade is both of liberty and property, but licenses and permits are first required for many employments in the several States. In *Breckbill v. Randall*, persons selling patent rights, were required to file with the clerk of the county, a copy of the patent, with an affidavit of genuineness and authority to sell. Statutes of Alabama requiring locomotive engineers to be licensed, and also requiring examination of persons serving on railroads within the State, for color blindness, disqualifying for such service those found affected, and requiring the railroad companies to pay the fees for such examinations, were held not in conflict with the Constitution.² The employment of an engineer who cannot read, is forbidden in New York.³ Any officer of a railway company who knowingly directs or suffers a freight, lumber, merchandise or oil car, to be placed in the rear of a car used for conveyance of passengers, is guilty of a misdemeanor. Plumbers are required to be licensed.⁴ But a State law is unconstitutional which requires a person to take out a license for carrying on interstate commerce.⁵ The case, however, is different, says the court, when the business is not under the regulating power of Congress. "The insurance business, for example, cannot be carried on in a State by a foreign corporation, without complying with all the conditions imposed by the legislation of that State, and the legislature may make regulations in regard to the speed of railroad trains in the neighborhood of cities and towns, in regard to precautions in the approach to bridges, tunnels, deep cuts and curves, and generally with regard to all operations eminently local in their character.

¹ N. Y. Laws 1884, chap. 251.

² 102 Ind. 528, cited by Judge Blatchford in *Budd v. People*; see *Sawyer v. Davis*, 136 Mass. 239; *Smith v. Alabama*, 124 U. S. 465; *Nashville, C. & St. L. R. R. v. Alabama*, 128 U. S. 96. Georgia Stat. 1892, requires railroad telegraph operators to have one year's experience, examination and certificate of competency for telegraph operators before employment on a railroad.

³ Penal Code, §§ 418, 419; Penal Code, § 422, am'd 1889, chap. 267; see, also, § 423.

⁴ N. Y. Laws 1892, chap. 602; R. S. Ohio, 7703, 7710; so, also, in N. J., see Laws of 1892.

⁵ *Crutcher v. Com. of Kentucky*, 141 U. S. 47; see opinion of Mr. Justice Bradley, *Pickard v. Pullman S. Car Co.*, 117 U. S. 84; *Welton v. Missouri*, 91 U. S. 275; *Walling v. Michigan*, 116 U. S. 446; *The State v. North and Scott*, 27 Mo. 464.

Because of this local effect a law of Iowa was upheld¹ providing that "any person who has in his possession in that State any Texas cattle, which have not been wintered north; shall be liable for any damages that may accrue from allowing such cattle to run at large, and thereby spreading the disease known as the Texas fever. We have already seen that in Alabama a law prohibited the moving or transportation of cotton seed after sunset and before sunrise of the succeeding day;² that in New York, Indian meal could not be brought into the city on the deck of a vessel; and by a recent law commission merchants³ or persons selling agricultural products and farm produce on commission are required to give to the consignor true statements, first of what property has been received, and again of what portion has been sold, and the price received, and a violation of the law is declared to be a misdemeanor.

Auctioneers⁴ who have a *quasi* public function, and whose sales-entry is for all parties, are under limitations and require licenses, or must give a bond. Emigrant agents, druggists, insurance agents, pawnbrokers, peddlers, pilots, physicians, ferrymen, hackmen, street vendors, an owner of a stallion, keepers of certain kinds of boarding-houses, showmen and many others are required to have licenses.⁵ One only has to look in the laws of any State under the head of licenses, to see under what control of this power of the State, many occupations are. As regulations of internal police such laws are upheld.⁶ But the license

¹ *Kimmish v. Ball*, 129 U. S. 217. The Supreme Court of Indiana, December 18, 1892, in *State v. Ind. & I. S. R. R. Co.*, sustained act of March 9, 1889, requiring time of railroad trains to be posted at stations. 133 Ind. 69; see, also, *Car-Coupling Law of Congress*, 1893, requiring automatic car couplers to be adopted.

² *Davis v. State*, 63 Ala. 58; 1 R. S. N. Y. 539, § 23; *Com. v. Huntley*, 156 Mass. 236. Retail sales made by a local agent for a principal, out of the State, are within the prohibition of State laws, and although in unbroken packages are not necessarily articles of interstate commerce. *Com. v. Schollenberg*, 27 Atl. R. 30; *Graves v. Johnson*, 156 Mass. 200; *Com. v. Zelt*, 138 Penn. St. 615.

³ N. Y. Laws 1892, chap. 656.

⁴ N. Y. S. L. 1838, chap. 52; 1883, chap. 810; 94 U. S. 125; *Sipe v. Murphy*, 49 Ohio, 536.

⁵ See N. Y. R. S. p. 1843, Birdseye Ed.; R. S. Stat. Ohio, §§ 6968, 8853, 8853; Note 107 U. S. pp. 51, 52, 53, 54; *Phila. Fire Assn. v. New York*, 119 U. S. 110; *id.* 129, *Home Ins. Co. v. N. Y.* There may be an occupation tax on lawyers, *Ex parte Williams*, 20 S. W. R. 580; *Texas Ct. Appeals of Nov. 19, 1892*, 47 Alb. L. J. 73; for unconstitutional limitation, see *Ex parte Whitwell*, 32 Pac. R. 820.

⁶ *City of New York v. Miln*, 11 Pet. 359; *Slaughter-House cases*, 16 Wall. 36; *License cases*, 5 How. 504; *Nathan v. Louisiana*, 8 How. 73; *Ex parte McNeil*, 13

must not be a tax on the goods themselves, as merchandise in commerce.' In the *Barber* case the court holds, that to require as a condition of sales in Minnesota of meat, that the animals have been inspected in Minnesota, is unconstitutional, and that a law imposed by the State upon interstate commerce is not to be upheld, because it applies alike to all people, including those of the State itself.

In *Cooley v. Board of Wardens of Philadelphia*, it was held that the laws for the regulation of pilots and pilotage are not laws laying impost or duties, within the meaning of the Constitution, if they do not pass the appropriate line, and they cannot be considered as passing that line because they require the payment of half pilotage fees by certain vessels, which decline to receive a pilot.* The court continues: "Numerous laws of this kind are cited; and their fitness as part of a system of pilotage, in many places, may be inferred from their existence in so many different States and countries. They rest upon the propriety of securing lives and property exposed to the perils of a dangerous navigation," etc. In the *City of New York v. Miln*, the Court says: "The act of the State of New York, which inflicts a penalty upon the master of a vessel arriving from a foreign port, who neglects to report to the mayor or recorder an account of his passengers, is not a regulation of commerce, but of police, and is not in conflict with the Constitution of the United States."

In *County of Mobile v. Kimball*,[†] which has frequently been cited with approval in subsequent cases, it was held that "State legislation is not forbidden touching matters, either local in their nature or operation, or intended to be mere aids to commerce, for which special regulations can more effectually provide, such as harbor pilotage, beacons, buoys and the improvement of harbors, bays, and navigable rivers within the State, "and the issue of bonds for the improvement of the harbor of Mobile is not a taking of private property for public use. For quarantine and for harbor improvement purposes vessels have been

Wall. 236; *Kidd v. Pearson*, 128 U. S. 1; see 114 U. S. 217-218; 134 U. S. 594; 95 U. S. 471; *Provident Institution v. Mass.*, 6 Wall. 625, 626; *Ficklen v. The Taxing Dist. of Shelby Co., Tenn.*, 145 U. S. 1.

[†] *Welton v. State of Mo.*, 91 U. S. 275; *Walling v. Michigan*, 116 U. S. 446; *State of Minnesota v. Barber*, 136 U. S. 813; *Bowman v. Chicago & N. W. R. R.*, 125 U. S. 465; *Pickard v. Pullman S. Car Co.*, 117 U. S. 34.

[‡] 12 How. 299; see "The Alcade," 30 Fed. R. 133.

[§] 102 U. S. 691.

required to pay fees for examination as to sanitary conditions, and for services rendered to the vessel, and also for the use of wharves, and the facilities and conveniences of the harbor, and such fees are held not to be a tax within the meaning of the Constitution.

The Constitution has prohibited a State to lay any duty on tonnage, and in the State Tonnage Tax cases,¹ this rule was held to apply not only to vessels owned by citizens of the State, but exclusively engaged in trade between places of the State. The fees exacted must not amount to a tax on registered tonnage, or a tax on freight, or transportation of passengers. Transportation between the States, or between the United States and foreign countries must be free from charge by State authority "other than such as are imposed by way of compensation, for the use of property employed, or facilities afforded for its use." But the requirement, that a vessel passing a quarantine station of New Orleans, should pay the fee required for her examination, is a compensation for services, and not a prohibited tonnage tax, and a wharfage rate measured by the tonnage of the vessels which use the wharves is equally unobjectionable, even though such rate is estimated to be sufficient to construct new wharves, and may realize a profit over expenses.² So likewise an ordinance of the city of Vicksburg, establishing the rate of wharfage to be collected from steamboats and other craft landing and lying at that city.³

Similar ordinances were sustained in *Packet Company v. St. Louis* and *Packet Company v. Keokuk*,⁴ and in *Transportation Company v. Parkersburg*,⁵ the court said that "the character of the charges must be determined by the ordinance itself; and as it on its face imposed them for the use of the wharf only, and not for entering the port or lying at anchor in the river, the court, though it might deem them unreasonable and exorbitant, will not entertain an averment that they were intended as a duty on tonnage, nor inquire into the secret purpose of the body imposing them." This doctrine of the constitutional power, to impose so much of restraint upon vessels, their masters and owners, as properly belong to the enforcement of quarantine and port regulations, may, therefore, be considered as well settled. It may also include expenses of

¹ 12 Wall. 204.

² *Gloucester Ferry Co. v. Penn.*, 114 U. S. 196; *Henderson v. Mayor*, 92 U. S. 259.

³ *Morgan S. S. Co. v. Louisiana*, 118 U. S. 455.

⁴ *Onachita Packet Co. v. Aiken*, 121 U. S. 444.

⁵ 100 U. S. 428; *Packet Co. v. Keokuk*, 95 U. S. 80.

⁶ *Transportation Co. v. Parkersburg*, 107 U. S. 691.

Wm. v. v. v. - 1894.

ection both of cargoes and of certain classes of freight, as *e. g.* rags of the ship.

Under the head of licenses required for the general purpose of the order of society and the public morals, as well as for the protection of children, are the restraints placed in many cities upon theatres, exhibitions and shows. Licenses are required for children in certain amusements and for acrobatic exhibitions, and peculiar restrictions are placed on persons in dangerous or offensive trades.¹ The power extends to fixing the size of barrels,² and the weight and size of a loaf of bread.³

Markets have, from early times and almost continuously, been subject to police laws, especially, in our day, the meat and animal markets. Originally they come under such restrictions, by the ordinary definition of public use and the public welfare, which fix the limitations of the laws, but originally their privileges were claimed by the sovereign, and sanitary reasons first gave them over, with the control of the business belonging to or incidental to them, for regulations and restraints, and at times have been complained of as invasions of the freedom of trade.

It was said that the plague in London raged particularly in the neighborhood of Smithfield, because of the pollution of the ground by offal, and all slaughtering in the city was prohibited by the king. In 1866 the legislature of New York gave power respecting them to the New York City Board of Health. In 1868 the Prussian government gave like control to the district authorities. In Paris, the abattoir system; in London, the reports to the commissioners of sewers, and the necessity of licenses for slaughter-houses; in Edinburgh, the removal of abattoirs outside of the built-up districts, the ordinances in force in New York, Philadelphia, Boston, Chicago, New Orleans and other large cities show the supervision of such trades found necessary

¹ The mayor of a city cannot, under the N. Y. law, grant a license for the employment of children in singing and dancing at a theatrical exhibition. *Matter of Stevens*, 54 N. Y. St. R. 559, *People ex rel. Sanders*, 54 N. Y. St. R. 349; N. Y. Penal Code, §§ 292, 384; L. 1892, chaps. 309, 268; N. Y. R. S. (Birdseye ed.), pp. 1049-57, 3266, 528; Ohio R. S., §§ 8805, 8809. Similar provisions are to be found in the laws governing most of our large cities, and in England and in European countries the government censorship is more strictly enforced respecting theatres and plays. See as to custody of children, *Van Walters v. Board*, 132 Ind. 567.

² N. Y. R. S. 542, § 36.

³ Ill. Stat., Starr & Curtis, vol. 3, pp. 188-192; *Guillotte v. New Orleans*, 12 La. Ann. 432.

at the present time. In 1870, the State of Massachusetts, with a view to the establishment of an abattoir, and the concentration and sanitary control of certain business, gave, by the act incorporating "The Butchers' Slaughtering and Melting Association, in Brighton," authority to the State Board of Health to order any one engaged in the business of slaughtering within six miles of Faneuil Hall, and not upon any island in the harbor, to slaughter cattle, sheep or other animals upon the premises of this corporation. The purpose of this act was carried out, and in 1871 the control of noxious and offensive trades was more effectually placed in the State board.¹

In Illinois, Louisiana and other States similar statutes have been adopted, the State delegating to local administration jurisdiction respecting these regulations.

In Bush and others against Seabury² the New York Supreme Court sustained, under the act of April 8, 1801, the trustees of the village of Poughkeepsie in enforcing a by-law "to regulate the public market of the village of Poughkeepsie and to prevent forestalling the same," whereby limits were set for the sale of beef, pork, veal, mutton or other kind of meat, and the defendant was charged with a penalty for selling meat out of his wagon within the limits mentioned. The same court held in 1833, in Village of Buffalo v. Webster,³ that "where a by-law of an incorporated town forbids the hawking about or selling by retail meats within the bounds of the corporation, and within certain distances thereof, the sale of a quarter of lamb to a grocer at a place not within the allowed limits, and taking goods in payment is a violation of the ordinance, subjecting the seller to the penalty imposed; and further it seemed a stranger would be subject to the law and *pro hac vice* would be deemed an inhabitant and chargeable with the law." Chief Justice Savage in this case expounds this rule to the same effect as have other courts in later decisions. He says: "At common law corporations have power to make by-laws for the general good of the corporation. They must be reasonable and for the common benefit;

¹ See Gen. Stat. Mass., chap. 365, Laws 1870; chap. 167, Laws 1871; 5th Ann. Rep., Mass. St. Bd. H., 1874, pp. 6-21; 8th Ann. Rep. pp. 3, 4; 6th Ann. Rep., N. Y. City Bd. H., 1874, p. 773, note.

² 8 Johns. 418; Petz v. City of Detroit, 95 Mich. 169; 10 Wend. 100; see Nightingale's case, 11 Pick. 168; City of Buffalo v. Schleifer, 21 N. Y. Supp. 918; Com. v. Crowell, 156 Mass. 215; Village of Stamford v. Fisher, N. Y. Ct. App., Nov. 28, 1898.

³ 16 Wall. 62; 11 U. S. 746; 97 U. S. 659.

they must not be in restraint of trade, nor impose a burden without an apparent benefit. If it appears to the court to be reasonable it is sufficient, though it be not averred in the pleading to be so.

A by-law for the regulation of trade and imposing particular restraints as to time and place is good; but general restraints are bad. For example, a by-law that no meat should be sold in the village would be bad, but that meat should not be sold except in a particular place is good, not being a restraint of the right to sell meat, but a regulation of that right. The case of *Pierce v. Bartram*, Cowp. 269, involved the principle of this case. The law was that no butcher or other person should within the walls of Exeter slaughter any beast; it was objected that this by-law was void as being in restraint of trade and including persons not free of the city. Lord Mansfield said the by-law in question is not a restraint of trade, but only a regulation of it in this particular city, and as to the defendant being a stranger, he said he was an inhabitant *pro hac vice*."

Public use is defined by the New York Supreme Court in the *Matter of the Bloomfield and Rochester Natural Gas-light Company v. Richardson*,¹ and the statement is applicable to many instances of the exercise of police powers. The court says: "It is not necessary that the improvement should directly benefit the people of the whole State, but the direct public benefit contemplated, may be confined to a particular community. When the use to which private property is to be appropriated is a public one, the legislature is the sole judge of the necessity or expediency of the appropriation. In general the legislature is the sole judge of what constitutes a public use. But to a very limited extent the constitutionality of a statute, purporting to confer the right to take private property for public use, is a judicial question. It seems if any business or enterprise can fairly be supposed to be a matter by which the public of a particular community or various communities may be benefited, or if it has for its object or one of its objects, a matter which may be for the public benefit, then such business enterprise is a public use within the meaning of the Constitution, although the parties engaged in it may be actuated solely by the inducement of private gain."

This is equally true of the term, public interest, which determines the interference in many directions with the use of property or in business enterprise. It is not limited to the benefit to be received under

¹ 63 Barb. 437.

the law of eminent domain, but may relate to the prevention of an evil result, while the property remains in private hands. The principle is amply elucidated in the discussion and many citations in Mr. Pomeroy's able brief given in the report of this case. The legislature becomes almost a dictator, as under the old Roman formula to see to it that no part of the community has injury. Docks, telephone and electric light companies, elevators like inns and railways must do public service and at reasonable charges. Their control by fixed laws can no longer be questioned.¹ Where the evidence was, that the stretching of electric wires over and upon the roofs of buildings, is extremely dangerous, both as being liable to originate fires, and as obstructions to the extinguishment of fires otherwise originated, a city ordinance² absolutely forbidding the practice, is a valid exercise of police power, was held in *Electric Improvement Co. v. City and County of San Francisco*; and the requirements of railroads to build cattle-guards and

¹ *Munn v. Illinois*, 94 U. S. 113; *Case of Budd*, 143 U. S. 517, and 117 N. Y. 1; *Buffalo E. S. R. R. v. Buffalo S. R. Co.*, 111 N. Y. 132; *People v. Boston & A. R. R.*, 70 N. Y. 569; *Bartholf v. O'Reilly*, 74 N. Y. 509; *Chicago, B. & Q. R. R. v. Iowa*, 94 U. S. 155; *Spring Valley Water-Works v. Schottler*, 110 U. S. 347; *Dow v. Beidelman*, 125 U. S. 680; *Railway v. Railway*, 30 Ohio St. 604; *State v. Gas Co.*, 34 Ohio St. 572; *Ruggles v. People*, 91 Ill. 256; *Baker v. State*, 54 Wis. 368; *Nash v. Page*, 80 Ky. 539; *Girard Storage Co. v. Southwark Co.*, 105 Penn. St. 248; *Webster Tel. Co.*, 17 Neb. 126; *Stone v. Yazoo and Miss. Valley R.*, 62 Miss. 607; *Hackett v. State*, 105 Ind. 250; *Central Union Tel. Co. v. Bradbury*, 106 Ind. 1; *Central Union Tel. Co. v. State*, 118 Ind. 194; *Ches. & P. Telephone Co. v. Baltimore & O. Tel. Co.*, 66 Md. 899; *Del., etc., v. Central Stock Y. Co.*, 45 N. J. Eq. 50; *Zanesville v. Gas-light Co.*, 47 Ohio St. 1; *Chicago R. Co. v. Minnesota*, 134 U. S. 418; *Ruggles v. Illinois*, 108 U. S. 526; *Railroad Commission cases*, 116 U. S. 307; *Georgia Banking Co.*, 128 U. S. 174; *People, ex rel. N. Y. E. L. Co., v. Squire*, 107 N. Y. 593; 145 U. S. 175; *N. Y. State Laws*, chap. 499, Laws 1885; chap. 503, Laws 1886; *R. S. Ohio*, § 8752; *New Orleans Gas Co. v. Louisiana L. H. P. & M. Co.*, 115 U. S. 650; *Stein v. Bienville W. S. Co.*, 141 U. S. 67; *Charlotte C. & A. Co. v. Gibbes*, 142 U. S. 886; as to the regulation of speed of railroad trains, *Schlereth v. Mo. P. Co.*, 96 Mo. 509; *Virginia M. R. Co. v. White*, 84 Va. 498; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408; and as to the nature of *quasi* public corporations and their tenure of property as subject to lien, *Hill v. Railroad*, 11 Wis. 214; *Railroad Co. v. Gilmore*, 37 N. H. 410; *Platt v. Railroad Co.*, 26 Conn. 544; *Coe v. Peacock*, 14 Ohio St. 187; *Lathrop v. Middleton*, 23 Cal. 257; *State v. Rives*, 5 Ired. 307; *Board of Education v. Greenebaum*, 39 Ill. 609; *Badger Lumber Co. v. Marion Water S. Electric L. & P. Co.*, 48 Kansas R. 182; 30 Pac. R. 117; *N. Y. R. S. Vol. 3* (Birdseye ed.) pp. 3339-3341; s. v. v. *Wharves L. of 1882*, chap. 410, §§ 798, 799, 800, 801, 802; *Laws 1865*, chap. 569; *People v. Com'rs of Taxes*, 101 N. Y. 322; *Taylor v. Atlantic M. I. Co.*, 37 N. Y. 275; 68 N. Y. 552; 106 N. Y. 129.

² 45 Fed. R. 593, same v. Scannell, id. 596.

bridges,¹ to furnish waiting rooms, and erect depots, to put signboards and flagmen at crossings, and regulating stations and fares, and speed at tunnels, and passing through or by cities, are familiar to us, with the more recent acts to prevent the use of stoves, or furnaces, to heat passenger cars. Also the acts for the safety and protection of life and property, we have already seen, come within the ordinary police² powers, including the examination of scaffolding, ropes, blocks, pulleys, and tackle used in the construction, repairing or painting of buildings, and the inspection and regulation of hoistways, and of elevators, boilers and engines, well holes in buildings, fire-escapes, and a coil of rope to be provided in every lodging room of a hotel.

The mandate of the law has long laid upon innkeepers and common carriers. They shall receive the public who come to them to the extent of their reasonable accommodation, and impose no unreasonable terms upon them. As Lord Hale has said of ferries, they must give attendance at due time, supply the necessary accommodations to all persons in due order, and take but reasonable toll, so that it is said of these pursuits generally classed together so far as duty is concerned, that by force of general law the persons engaged in them have a public duty to perform, and an extraordinary responsibility. Gaius while defining the obligation on these occupations, yet at the same time distinguishes the object of each. "*Nauta ut trajiciat vectores, Caupo ut viatores manere caupona patiatur.*" The edict³ of the praetor included shipmasters, innkeepers, and stable-keepers, in the responsibility which is fixed upon them by public policy. Much relative to their public and peculiar duties is so generally recognized, and so familiar, that it needs

¹ 1 R. S. N. Y. 683, 684; L. 1844, chap. 248; People v. Jenkins, 1 Hill, 409; People v. N. Y., N. H. & H. R., 5 N. Y. Sup. 945; 128 N. Y. 635; State v. Kansas City, Fort., S. & G. F. R. Co., 32 Fed. R. 722; State v. Railway, 83 Mo. 144; N. Y. & R., 45 N. J. E. 436; People v. B. & A. R. R., 70 N. Y. 569; chap. 676, N. Y. 1892, §§ 33, 37; People v. Munn, Budd v. People, Crutcher v. State of Kentucky, *supra*. Maryland has in 1893 extended the time to discontinue stoves in cars until 1894.

² See chap 517, L. N. Y. 1892; as to elevators, see N. Y. L. chap. 275, 1892, § 492, chap. 261, 1886; as to boilers, see N. Y. Cons. Act, 1882, §§ 310-12; N. Y. L. 1892, chap. 410, § 487. Georgia in 1892 required seaside hotel-keepers to maintain life boats; see Ohio Stat. 1892; Mass. Stat. 1888, chap. 867, 1885, chap. 374; Colwell v. Slade, 156 Mass. 84; Rose v. King, 49 Ohio, 218.

³ *Ait Praetor, Nautas caupones stabularii quod cuiusque saluum fore receperint nisi restituent in eos iudicium dabo* J. C. D. IV, 9, see Puchta Inst. 3, 116.

1 Har. L. T. 6; see Platt v. Hibbard, 7 Cow. 499; Ang. Com. Car., § 67; 2 Kent Com. 592 *seq.*; Corp. J. C. IV, Tit. 9, 5; 8 Kent Com. 7; Bennett v. Mellor, 5 Term R. 274; Thompson v. Lacey, 8 B. & A. 285; Story Bail. 302.

no discussion, but new questions have arisen under more recent legislation, both in Great Britain and in this country, especially under the British Passenger Acts, and the United States Immigrant laws; and furthermore by analogy¹ perhaps, requirements similar to a limited degree, have been made upon restaurants, and theatres, and places of public entertainment, growing out of this common feature of their business, that the public in general is invited to the use and enjoyment of the advantages they offer, for the necessities or pleasures of daily life. While their offer, as that of the innkeeper's hospitality, is on the basis² of a contract, yet two consequences immediately attach, whereof a willful disregard on their part becomes a tort and a public wrong³ for which the courts will apply a remedy.

They must receive every one, amenable to proper order and regulations, and protect them, and their property while *infra hospitium*, or within their care. To be held liable, therefore, for this duty of hospitality which they cannot refuse, is a curious result from a relation entered into voluntarily on the part of the guest or customer, but partly forced upon the innkeeper, or in some cases the restaurant keeper and theatre manager, by public policy, and by such laws as those of so called civil rights, or under the amendment of the Constitution and laws of some of the States, having reference to the rights of colored persons, and those formerly held in slavery. Many of the old cases turned on the question, whether the plaintiff or his goods were or were not "*infra hospitium*," but the new cases under the laws above spoken of, relate to specific duties imposed by public enactments.⁴

The Passenger Act of Great Britain, August 14, 1855, required every passenger ship to carry a duly qualified medical practitioner, and to supply medicine proper and necessary for disease; and actions were brought to fix additional responsibility for the treatment of patients by

¹ Hollister v. Nowlen, 19 Wend. 234.

² 2 Kent Com. 571, 607; 3 Black. Com. 165; 1 Smith's L. C., H. & W.'s notes, 307, *seq.*

³ Orange Bank v. Brown, 8 Wend. 158.

⁴ Calye's case, 8 Co. 32; East I. Co. v. Pullen, Strange's R. 690; Tower v. Utica & S. R. R., 7 Hill, 47; LeConteur v. London & S. W. R. Co., 18 L. J. (N. S.) 325; Grosvenor v. N. Y. C. R. R., 39 N. Y. 34; Dale v. Hale, 1 Wilson, 282; Head Money cases, 112 U. S. 580; Passenger Act, 1855 of Great Britain; Act of Congress, August 3, 1882; An act to regulate immigration; N. Y. Penal Code, § 383; People v. King, 110 N. Y. 418; Act of Gen. Ass., Louisiana, approved Feb. 23, 1882; Hall v. DeCuir, 95 U. S. 485. Miss. Stat., March 2, 1885; Louisville, N. O. & T. R. v. State of Miss., 133 U. S. 587.

the surgeon thus provided, charging that there were on his part errors or mistakes. The United States law was not dissimilar, and under this also, such actions were brought, but the decisions of the courts have been, that carriers were only liable for a neglect of the duty imposed by the terms of the act, to use a reasonable discretion, in providing a competent man, and the supplies required, and were not liable for an error of judgment on the physician's part; nor was the carrier compelled to employ the highest skill and largest experience. The United States laws for the protection of immigrants, further direct many details in the care of immigrants, and for food, air, light and ventilation. Some of these provisions can only have support in the police power of the general government, where such a subject, as commerce, including immigration, is in its exclusive charge, since a number of these provisions are beyond any mere regulation of commerce.¹

This police power of the United States has been doubted, but seems almost a necessary consequence, as was found recently in respect to the right to protect "the peace of the United States," and the person of a United States judge under exceptional circumstances.² The opinion of

¹ *Allan v. S. S. Co.*, 132 N. Y. 91; *Laubheim v. DeK.* N. S. Co., 107 N. Y. 229; *O'Brien v. Cunard S. S. Co.*, 28 N. E. R. 266.

² *Cunningham v. Neagle*, 135 U. S. 1; see *Tennessee v. Davis*, 100 U. S. 257. In *Ex parte Siebold*, 100 U. S. 395, the Supreme Court has said: "It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. We are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on a misconception of the nature and powers of that government. We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force, execute on every foot of American soil the powers and functions that belong to it. This power to enforce its laws and execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places." *Cooley v. Board of Wardens of Philadelphia*, 12 How. 259, respecting pilotage laws, is cited as follows: "Here, then, is a case of concurrent authority of the State and national government in which that of the latter is paramount." This rule is approved in *Cunningham v. Neagle*, 135 U. S. 16, upon a review of the authorities, and further, that "there is a peace of the United States" which it is the duty of the United States officers to protect and maintain. In *Ex parte John L. Rapier*, 143 U. S. 93, it is held that it is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality. That power may be abused furnishes no ground for a denial of its existence if government is to be maintained at all. It must be left

Mr. Justice Miller, in the *Head-money* cases, gives a somewhat different explanation, but one hardly adequate, when we consider the authority exercised under laws of Congress to absolutely prohibit the entrance into the country of classes of dangerous persons, and the importation of dangerous articles of commerce, and even to suspend, for a time, immigration.¹ He says: "The burden imposed on the ship-owner by this statute (act to regulate immigration) is the mere incident of the regulation of commerce, of that branch of commerce which is involved in immigration."² It is only a different view of the same problem, when the Supreme Court, in *Leisy v. Hardin*, states that articles (or persons) in such a condition as tend to spread disease are not legitimate subjects³ of commerce. The right to protect the public health and the public welfare, even to the extent of a partial suspension of commerce in certain directions, when the necessity for it is apparent, is equally an incident of the control of these subjects vested in Congress, and exercised by the Federal officers beyond the limits, wherein the police powers reserved to the States are restrained. When used to any un-

to Congress, in the exercise of a sound discretion, to determine in what manner it will exercise a power which it possesses. As to laws respecting the Chinese, who of that race may enter the country, and the necessary certificate see *Wan Shing v. U. S.* 140 U. S. 424; chap. 164, 23 U. S. R. S.) "prohibiting the importation of aliens, under contract, to perform labor, does not prohibit contract with alien to be a pastor. The intent of Congress was simply to stay the influx of cheap and unskilled labor. No purpose of action against religion can be imputed to any legislature, State or nation." *Church of the Holy Trinity v. U. S.*, 143 U. S. 457.

¹ See Passenger Act, 1882, chap. 874, §§ 3, 4, 6; also Act to Regulate Immigration, chap. 370, Aug. 3, 1882; chap. 164, 1885; chap. 220, 1887; chap. 551, 1891; chap. 220, 1884; chap. 1004, 1888; see 19 Fed. R. 653; 23 Fed. R. 906; 28 Fed. R. 796; 36 id. 303; 40 id. 709; 41 id. 751; 43 id. 114; 45 id. 44; Chinese Exclusion case, *Chae Chan Ping v. U. S.*, 180 U. S. 581; *Wan Shing*, 140 U. S. 424; see the proclamation or circular of the Treasury Department, U. S. Marine Hospital Service, issued with the approval of the President, September 1, 1892, ordering "that no vessel, from any port, carrying immigrants shall be admitted to any port of the United States until said vessel shall have undergone a quarantine detention prescribed. The general government in the same month established a quarantine camp on United States ground at Sandy Hook, and Federal officers and troops maintained the quarantine lines there and in the sound at New York. U. S. Stat., April 29, 1878, 20 Stat. 37, provides that the Surgeon-General of Marine Hospital Service shall frame needful rules and regulations under the direction of the Secretary of the Treasury, subject to the approval of the President, and for the enforcement of the *national quarantine rules*. See, also, Opinion of Solicitor-General, and of Attorney-General, September 10, 1892. An U. S. quarantine existed for years in several States.

² 112 U. S. 595.

³ 185 U. S. 112.

necessary and unlawful excess, the courts will not hesitate to interpose the barrier of law, as in the Civil Rights cases.

The declaration by United States statute, that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement, was held, in the Civil Rights cases, unconstitutional, as applied to the several States. The fourteenth amendment to the United States Constitution does not "apply to every act of discrimination which a person may see fit to make, as to the guests he will entertain, or as to the people he will take into his coach, or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business."¹ The laws of the States require innkeepers and public carriers, to the extent of their facilities, to furnish proper accommodations to all unobjectionable persons, who, in good faith, apply for them, and they belong to the domain of State, not national legislation, but if the laws themselves make any unjust discrimination, Congress has power to afford a remedy.

Such laws protecting civil and public rights have been enforced by the courts. In New York State in *People v. King*, the proprietors of a skating rink, in the village of Norwich, in 1884, were indicted for refusing admission, because applicants were colored men, and were held guilty of a misdemeanor.² A like ruling was of the Illinois Supreme Court, relative to circles or grades of seats in a theatre, and by the Michigan court, for distinction made in a restaurant between black and white men, but statutes have been sustained for separate schools³ for black children, and "the rules of a theatre reserving certain sections for whites, while allowing persons of color to occupy others, are not in violation of the fourteenth amendment of the United States Constitution." The court in the case of *Younger v. Judah*,⁴ adds, "We believe it is conceded on all hands, that a common carrier may make and enforce reasonable rules for seating passengers, and it has been held that such a carrier, in the absence of any statute to the contrary,

¹ 109 U. S. 3; see *Virginia v. Rives*, 100 U. S. 318; U. S. R. S., §§ 1977-91, 5510, 5519; Civil Rights Act, March 1, 1875, chap. 114; U. S. v. *Harris*, 106 U. S. 629; *Hall v. De Cuir*, 95 U. S. 485.

² See *People v. King*, 110 N. Y. 418; N. Y. Penal Code, § 883; Civil Rights Act of Miss., February 7, 1873; Constitution of Louisiana and Acts of Louisiana in 1870, 1871; *Joseph v. Bidwell*, 28 La. Ann. 882; *Donnell v. State*, 48 Miss. 661; *Boyle v. Curry*, 128 Ill. 287; *Ferguson v. Gies*, 82 Mich. 358; *Westchester, etc., R. R. v. Miles*, 55 Penn. St. 209.

³ *Lehew v. Brummell*, 103 Mo. 546.

⁴ *Younger v. Judah*, 111 Mo. R. 303.

may separate white and black passengers in a public conveyance¹ as a railroad car, and further, "Colored persons have their own schools, their own churches, and often their own places of amusement. Whites attending places of amusement designed specially for colored persons, may be required to occupy separate seats. When colored persons attend theatres, and other places of amusement, conducted and carried on by white persons, custom assigns to them separate seats. Such separation does not necessarily assert, or imply inferiority on the part of one or the other. It ordinarily contributes to the convenience and comfort of both.

A peculiar case was *McGuinn v. Forbes* in the District Court of Maryland.* *McGuinn*, who was the pastor of a Colored Baptist Church at Annapolis, alleged in his bill that on the 6th day of July, 1887, he purchased a ticket by the *Mason L. Weems* for *Millenbeck, Va.*

When the supper bell rang he seated himself at the table, and upon his refusal to move, the food and dishes were removed to another table, the passengers all taking seats at that table and leaving him alone. Afterward the passengers threatened him, which was the cause of his leaving the boat eight hours before reaching his destination. The court held: "Within reasonable limits the carrier must be allowed to manage his own affairs. In this case, although the petitioner suffered some discomfort and limitation, he was not obliged to leave the table and his supper was served, and I do not find that he was discriminated against in any manner, which can be made the ground of a legal action. It was foolish and unreasonable, as I have said, in the other passengers to object to sit at the same table with this libellant, who is a well-behaved, educated minister of the Christian religion, simply because he may have negro blood in his veins, but the owners of the steamboat cannot be held responsible in damages for that. There is some ground for a suspicion that the petitioner was not sufficiently protected by the officers of the steamboat, but the proof fails to establish it. I, therefore, dismiss the libel."

Education so nearly concerns the public welfare in our country that public authority has been continuously invoked to make it compulsory, so far as the necessary instruction in reading, writing, spelling, English

¹ *West Chester, etc., R. R. v. Miles*, 55 Penn. St. 209; see *Georgia St. Law*, 1892; *Louisville, N. O. & T. R. R. v. Miss.*, 133 U. S. 587; *Chilton v. St. Louis & I. M. Ry. Co.*, 114 Mo. R. 88; *Railroad Co. v. Benson* (Tenn.) 4 S. W. R. 7; *Houck v. Railway Co.*, 88 Fed. R. 226; *Day v. Owen*, 5 Mich. 520.

* 87 Fed. R. 639.

grammar, geography and arithmetic.¹ Some of the States, as Connecticut, add instruction in some honest and lawful calling. All this preparation for citizenship is enforced directly and indirectly, and town officers, commissioners of education and inspectors, both of schools and factories, receive or make reports on attendance. In most of the States employment of children under thirteen years of age is prohibited, and school attendance between the ages of eight and fourteen must be for periods of from fourteen to twenty weeks. In New York State the period is fourteen weeks in every year. In Massachusetts twenty weeks. In Connecticut twenty-four weeks for children under thirteen and twelve weeks in every year for children between thirteen and fourteen are required, and Connecticut further forbids the employment of any child under fourteen at labor, if such child shall have resided in the State nine months and shall not have attended a school sixty full days in the twelve months preceding. Fines are laid upon the parents and persons having the care of young children for every week of the required school attendance not observed, and children who are habitual truants, may be arrested and subjected to such discipline, instruction, and confinement, as shall, in the judgment of the local authorities who shall make the needful arrangements, rules and regulations, be most conducive to the welfare of such children, and to the good order of the city or town. Employment of children, who have not the certificate of school attendance, is forbidden under a penalty, and the school trustees, as well as factory inspectors, examine into and report on these facts. Appropriations are generally made in all the States for educational purposes, and some of the States have provided separate schools for colored persons.² Georgia has made such a school a branch of its State University.

Considerations for the public health, safety and morals lead each year to new police enactments, and it may be feared that the original objects are obscured by the zeal of legislators for holidays and hours of labor. The Supreme Court in *Soon Hing v. Crowley*,³ said in Mr. Justice Field's opinion in 1884, the employment of time must be subject to such general rules as are adjusted by society for the common

¹ Mass. Pub. Stat., Rev. 1882, p. 317; Supp. 211, 735, 546, 547, Laws 1887, chap. 280; Mass. Laws 1888, chap. 348; Gen. Stat. of Conn. 2102, chap. CXXXI, §§ 2103, 2105, 2108, 2109, 2112; Ohio R. S., §§ 2573, 6986; Laws 1892; N. Y. Laws 1874, chap. 421; N. Y. Laws 1876, chap. 372.

² See L. L. Ohio, Georgia, New Jersey, Utah, Colorado and New York, 1892.

³ 113 U. S. at p. 709.

welfare. "Society says what contracts shall be in writing, and what may be verbally made, and on what days they may be executed, and how long they may be enforced, if their terms are not complied with. So too with the hours of labor. On few subjects has there been more regulation. How many hours shall constitute a day's work in the absence of contract? At what time shops in our cities shall close at night are constant subjects of legislation."

"Laws setting aside Sunday as a day of rest are upheld not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops, and in the heated rooms of our cities, and their validity has been sustained by the highest courts of the States." A somewhat broader and more satisfactory statement, and mention of decisions upon Sunday laws, is by the N. Y. Court of Appeals in *Smith v. Wilcox*¹ in 1862, where Mr. Justice Allen observes that "our statute regulating the observance of Sunday prohibits all servile labor or work on that day, excepting works of necessity and charity, unless done by those who keep Saturday as a holy day, and whose labor does not disturb other persons in the observance of the first day of the week as holy time. The statute is in harmony with the religion of the country, and the religious sentiment of the public, and for the support and maintenance of public morals and good order.

Its design is not to enforce the conscience or compel the religious observances of the day, or compel conformity to any religious rites or ceremonies, but simply to secure to the day the outward respect and observance which is due to it, as the acknowledged Sabbath of the great mass of the people." A contract for the publication of an advertisement in the newspaper to be issued and sold on Sunday was held

¹ 24 N. Y. 853; see opinion, U. S. Sup. Ct., *Ch. of the Holy Trinity v. U. S.*, 148 U. S. 457, at pp. 465-471; *People v. Dennin*, 35 Hun, 327; *State v. O'Rourke*, 35 Neb. 614; *Cortez v. Territory*, New Mexico Sup. Ct., Aug. 24, 1892, 32 Pac. R. 504; *Com. v. McNeese*, 156 Mass. 231.

² *Carroll v. Staten I. R. R.*, 58 N. Y. 126; see Ohio State 1892, prohibiting barbers from carrying on their business on Sunday; N. Y. Pen. Code, §§ 259-277; R. S. Ohio, § 7033; 89 N. Y. 220; see also *O'Shea v. Cohn*, 33 Hun, 114; *People v. Dennin*, 35 Hun, 327; *Cornelius v. Reiser*, 18 N. Y. Supp. 113; N. Y. Pen. Code, §§ 263, 277; *People v. Moses*, 85 N. E. R. 498; see *Ex parte Newman*, 9 Cal. 502; *Ex parte Andrews*, 18 Cal. 673.

void. In a later decision¹ it was held that a common carrier may contract for carriage on Sunday and is held to the responsibility of his contract, and in *Platz v. The City of Cohoes*, the Court of Appeals refused to extend the operation of the statute. More recently we have a decision of the same court, in *People v. Moses*, which approaches nearer to a settlement of the legal principles and the questions of construction of the statutes involved. The defendant is thereby held guilty of a misdemeanor for fishing on Sunday in private grounds in a pond belonging to a club of which he was a member. The court says: "The Christian Sabbath is one of the civil institutions of the State; and that the legislature, for the purpose of promoting the moral and physical well-being of the people, and the peace, quiet and good order of society, has authority to regulate its observance and prevent its desecration, by any appropriate legislation, is unquestioned." (*Lindemuller v. People*, 33 Barb. 548; *Neuendorff v. Duryea*, 69 N. Y. 557.) We have, therefore, only to construe the statutes and ascertain whether they prohibit the act complained of. Section 259 of the Penal Code provides that "the first day of the week being, by general consent, set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community." It is not the meaning of this section that every act which is claimed to be a violation thereof must in fact be a serious interruption of the repose and religious liberty of the community, but the legislature in subsequent sections specified certain acts which are declared to be serious interruptions of the repose and religious liberty of the community — acts necessarily described in general and comprehensive terms which the law-makers believed had a general tendency to interfere with Sunday as a day of rest and religious worship. Section 263 prohibits all labor on Sunday, excepting works of necessity or charity; and it matters not whether the prohibited labor be public or private, wherever it is performed it is prohibited. In section 265 particular acts are specified which are prohibited as follows: "All shooting, hunting, fishing, playing, horse-racing, gaming or other public sport, exercise or shows upon the first day of the week, and all noise disturbing the peace of the day are prohibited." In sections 266, 267 and 268 other acts are specially pro-

¹ See Laws N. Y. 1892, chap. 298: "An act to provide for the health and recreation of the people by setting apart certain piers along the river fronts of the city of New York for their use and to make provision for the easier transaction of business by the people of the State at such piers."

hibited. It is thus seen that among the acts specially prohibited on Sunday is fishing. That is absolutely prohibited on Sunday everywhere and under all circumstances. It may be done in a community where it does not offend the sensibilities of any one, it may be done in such a manner as not to disturb the peace or interrupt the repose of religious liberty of the community, and yet the law is violated. It is quite unreasonable to suppose that the legislature meant that whenever any of these acts are charged as a violation of the law an issue can be framed and tried as to their public, offensive or disturbing character. The legislature has settled that matter by prohibiting them absolutely. A just regard for the rest, improvement, even for the appropriate recreation¹ of the people, has always been thought a part of good government, if not directly compulsory upon the private citizens. In this view, from time to time holidays have been ordered, and so far they have not been deemed inordinate.

Laws, determining the rules of labor, founded upon the principles already discussed, for the protection of minors, women and defenseless classes of people, and framed with due regard both to the interests of the State for health, for education and for safety, have been found necessary and have been generally established. The last-mentioned motive for safety has added new legislation. Georgia limits the runs of trainmen on its railroads to thirteen hours in twenty-four, and Ohio forbids trainmen and telegraph operators, who have been on duty for fifteen hours, to go again on duty until they have had eight hours rest. New York requires eight hours rest for any conductor, engineer, fireman or any trainman, who has worked in any capacity for twenty-four hours on any railroad of thirty miles in length, in whole or in part within the State.¹ The New York statute further provides that ten hours shall constitute a day's labor on all steam surface and elevated railroads.

This last-mentioned law, however, is weakened by a subsequent section which seems to involve a right of interference with contracts for labor dependent upon compensation as follows: "For every hour in excess of said ten hours labor, that any conductor, engineer, fireman, or any trainman of any railroad company or corporation, owned or operated within this State, who works under the direction of a superior, or at the request of such company or corporation, shall be required or permitted to work, he shall receive comparative compensation for said extra service in addition to his daily compensation."

¹ See Laws of Ohio, Georgia and N. Y. State 1892, chap. 711, N. Y.

The penalty is provided in a later section for a violation of any of the provisions of the act on the part of the railroad officers, and, therefore, the provision for extra pay is not to be regarded in that light, and is unequal in its effect upon the employer and the employed. It is at variance with other laws and some of the decisions on this and kindred subjects.¹

In Connecticut and Ohio, eight hours of labor, performed in any one day, by one person, shall be a lawful day's work,² unless it is otherwise agreed, and the same condition is fixed in other States for ten hours, and ten hours in factory labor for women and children are the rule, and this rule of labor is in some of the States to be posted in the factories and workshops. In Massachusetts minors under eighteen are not to work over sixty hours in one week, since reduced to fifty-eight. New Jersey authorizes fifty-five hours, and fixes the hours from seven to twelve, and one to six, in each working day for minors under eighteen, and women, except on Saturdays, when the hours are from seven to twelve. Massachusetts forbids the employment of children under fourteen before six o'clock in the morning or after seven o'clock in the evening, or in any indoor work during public school hours, unless the employer procures an employment ticket as provided by law. In construing the statute of Connecticut forbidding the withholding of two weeks' wages, because of an agreement requiring notice of a termination of the contract on a like penalty, as liquidated damages from both sides, the court said in *Pierce v. Whittlesey*,³ in 1889, when the plaintiff having left his employ without cause and without notice, had brought suit for wages: "It can hardly be supposed that the legislature intended to prohibit such a fair and reasonable agreement, in which both parties assumed the same obligation. It could not be said that wages were withheld because of a mere agreement to give notice, but because plaintiff, on a fair contract, upon sufficient consideration, had agreed to relinquish them, so that no wages were due to him. Dam-

¹ See *Fraser v. People*, 141 Ill. 171; *State v. Goodwill*, 38 W. Va. 179; *Godcharles v. Wigeman*, 118 Penn. St. 431; *Com. v. Perry*, 28 N. E. R. 1026 (Mass.); *Pierce v. Whittlesey*, 58 Conn. 104; *Matter of Jacobs*, 98 N. Y. 98; *Rockwell v. Nearing*, 35 N. Y. 302; 16 Wall. 89, 90, 103; 11 Co. R. 86.

² Gen. Stat. Conn. Rev. 1888, § 1746; R. S. Ohio, § 4365; Mass. Pub. Stat. Supp. 211, 128, 304, 638, 735; chap. 280, 1887; Laws 1892; N. J. Stat. 1892.

³ 58 Conn. 104; Chap. IV, p. 8 and note 6; 1 Smith W. Nat. chap. 10, p. 2; see 16 Wall. at page 110, note on Edict of Louis XVI, in 1776, to show that the right to labor and to employ labor is not a royal privilege to be purchased in any way; *Roussillon v. Roussillon*, 14 Ch. at p. 365; *Benj. Sales*, §§ 320, 521.

ages were not necessarily to be averred, the parties having agreed that a sum equal to two weeks' wages should be regarded as liquidated damages." This case presents the question of the effect of legislation upon the reciprocal obligations in a contract for labor, fairly and reasonably made by those who, on each side, have under the Constitution and the laws a right and freedom of contracting, such as we have seen under the head of public policy the courts endeavor to protect.

CHAPTER V.

MANDATORY AND RESTRAINING LAWS RELATIVE TO GAME, TO
INTOXICATING LIQUORS AND OLEOMARGARINE.

The police power extends over and fits into every subject, whatever its peculiarities, so soon and as often as the necessity appears for its exercise. The gradations of rights by which we have come to our present highly developed and elaborate game laws illustrate this principle. From the natural law, right common to mankind, to reduce to dominion and property, wild animals, birds and fish, which the civil law was forced to regulate for the sake of peace,¹ changed in England by the Normans, to become a royal privilege, dispensed by license, until its use was made, as Blackstone remarks,² "an offense constituted by a variety of acts of Parliament, and the crime itself of so questionable a nature, and yet an offense which the sportsmen of England seem to think of the highest importance, and a matter, perhaps the only one, of general and national concern. I mean the offense of destroying such beasts and fowls as are ranked under the denomination of game. The only national footing upon which we can consider it as a crime, is that in low and indigent persons it promotes idleness, and takes them away from their proper employment and calling, which is an offense against the public police and economy of the commonwealth."

This civil law right New York State extended so that any person "starting and pursuing game shall be deemed in possession so long as he continues in fresh pursuit thereof," and the common of fishery was protected by the legislature in 1787, when they re-enacted the British statutes applicable. But the colony of Massachusetts made some alterations and assumed the protection of fish in streams not navigable, and New York in the Revised Statutes deemed the regulation of

¹ Justinian 2, 12, 18.

² 4 Blackst. Com. 174.

³ 4 Blackst. Com. 416, speaking of obsolete forest laws "yet from this root has sprung a bastard slip known by the name of game laws." A violation of such laws even upon a highway constitutes a trespass. *Harrison v. Duke, of Rutland* Dec. 8, 1892, 68 L. T. R. (N. S.) 85.

fisheries a matter of public concern,¹ and the oyster fisheries in the public bays and rivers of New Jersey were held vested in that State, and Maryland took also similar grounds as to the State proprietorship. Our modern views may perhaps be accepted in the language of the New York Court of Appeals in 1875, in *Phelps v. Racey*:² "The protection and preservation of game has been secured by law in all civilized countries, and may be justified on many grounds, one of which is for purposes of food. The measures best adapted to this end are for the legislature to determine, and courts cannot review its discretion. If the regulation operate in any way unjustly or oppressively, the proper remedy must be applied by that body. Some of the provisions of the act in question might seem, to one unversed in the mysteries of the subject, to be unnecessarily stringent and severe, but we cannot say that those involved in this action are foreign to the objects sought to be attained, or outside of the wide discretion vested in the legislature."

We may add that another ground of justification may be found in the reservation of parks and forests and streams for the rest and recreation of the people, as is to be seen in approved national and State legislation of more recent days. But the court continues: "It is unnecessary to consider how far the exercise of the power of Congress (to regulate commerce among the States) would interfere with the authority of the States to pass game laws, and regulate and prohibit the sale and possession of game, either as a sanitary measure or for its protection as an article of food. It will suffice for this case that the statute does not conflict with any law which Congress has passed upon the subject."

It was very early seen that for effective regulation the having game "in possession at unseasonable times of the year or unseasonable hours of the day or night, on Sundays or on Christmas day,"³ must be pun-

¹ *Laws N. Y.* chap. 109, 1844; 2 *Kent Com.* 849; *Buster v. Newkirk*, 20 *Johns.* 75; 8 *Kent Com.* 415, 417; *Martin v. Waddell*, 16 *Pet.* 369; *Robins v. Ackerly*, 91 *N. Y.* 98; *Den v. Jersey Co.*, 15 *How.* 426; see review and discussion of royal grants and fishery rights in the State, *Trustees of Brookhaven v. Strong*, 60 *N. Y.* 56; *Chapman v. Haskins*, 2 *Md. Ch.* 485; *Com. v. Shaw*, 14 *Serg. & Rawle*, 9; *Moulton v. Libbey*, 37 *Me.* 472; *Manchester v. Com. of Mass.*, 139 *U. S.* 240.

² 60 *N. Y.* at p. 14. See review of State law on this subject, *State v. Lewis*, *Ind. Sup. Ct.*, April 17, 1893, 33 *N. E. R.* 1024.

³ 4 *Blackst. Com.* 175 and note; *Laws of N. Y.* 1871, chap. 721; chap. 488, 1892. In Massachusetts, Maine and other States mere possession within the prohibited period as by a common carrier was not sufficient. The *N. Y. law*, chap. 488, 1892, § 46, is that "the possession of deer or venison by common carriers unaccompanied by the

ishable with penalties, and that the making merchandise of it by selling or exposing it for sale must be controlled, prohibited or licensed. The defendant Racey had in his possession and exposed for sale in the city of New York quail and grouse on the 15th, 17th and 19th of March. His answer admitted these facts but alleged that they were killed within the lawful period or brought in from another State where the killing was lawful, and had been preserved by a process, invented by the defendant, for keeping game from one lawful season to another. The latter allegation was held immaterial as not provided for in the act, and the facts alleged constituted no defense.¹ These laws, it will be observed, unlike the ancient English laws, do not so much curtail private rights connected with real property as they fix the limits by seasons for their use. The U. S. Supreme Court, in *McCready v. Virginia*, held that "subject to the paramount right of navigation the regulation of which, in relation to foreign and interstate commerce, has been granted to the United States, each State owns the beds of all tide-waters within its jurisdiction, and may appropriate them, to be used by its citizens as a common, for cultivating and taking fish, if navigation be not thereby obstructed. The right which the citizens of the State thus acquire is a property right, and the Constitution does not vest the citizen of one State with any interest in the common property of the citizens of another State. "A law of Virginia, by which only such persons as are not citizens of that State are prohibited from planting oysters in the soil covered by her tide-waters, is neither a regulation of commerce nor a violation of any privilege or immunity of interstate citizenship."

owner is a violation of this section." See, also, § 1, chap. 721, 1871, forbidding the "transport" of game, except as provided. There is an exception for the sale in New York city of some kinds of fish lawfully taken from waters outside of the State. *Phelps v. Racey*, 60 N. Y. 10, is approved and followed in *Commonwealth v. Gilbert*, in the Supreme Judicial Court of Massachusetts in November, 1893, holding that Pub. St., chap. 91, § 53, extends to the sale of trout artificially propagated and maintained.

¹ A case is reported in the London Field, in 1888, of the prosecution and conviction in Paris of a noted restaurant for serving *Perdrix aux Choux* out of season, although it was proven that the partridges cooked were preserved and taken from a tin.

² 94 U. S. 391. *In re Ah Chong*, 6 Sawyer, 451, it was held that the statute of California prohibiting alien residents of the State from fishing in its waters was void as to the Chinese, both under the fourteenth (14th) amendment to the Constitution and the treaty with China. *Ex parte Marsh*, Cir. Ct. E. D. Va., Sept. 18, 1893, 57 Fed. R. 719; *State v. Nash*, 62 Conn. 47; *Prior v. Schwarz*, 62 Conn. 133; *State v. Thompson*, Sup. Ct. Me., 27 Atl. R. 97; *id.* p. 90; *Oliver v. Bailey*.

In *Manchester v. Commonwealth of Massachusetts*¹ the same court holds that, "subject to the paramount right of navigation, fisheries remain under the exclusive control of the State, and that Massachusetts can include Buzzards Bay within the limit of its counties and regulate the liberty of fishing within the territorial limits of the State. In this case Manchester was charged and found guilty, before the county magistrate of Barnstable, of a violation of the law of Massachusetts of May 6, 1886,² that "on the 19th day of July, 1889, he did then and there draw, set and use a purse seine for the taking of fish in Buzzards Bay within the limits of the commonwealth," and he was fined \$100 and to be committed to jail until the fine was paid. The opinion of the court by Mr. Justice Blatchford, after a learned exposition of the authorities, states: "The waters of Buzzards Bay are, of course, navigable waters of the United States and the jurisdiction of Massachusetts over them is necessarily limited, but there is no occasion to consider the power of the United States to regulate or control, either by treaty or legislation, the fisheries in these waters, because there are no existing treaties or acts of Congress which relate to the menhaden fisheries within such a bay. The fish commission was instituted "for the protection and preservation of the food fishes of the coast of the United States." Title 51 of the Revised Statutes relates solely to food fisheries and so does the act of 1887. The preservation of fish, even though they are not used for food for human beings, but as food for other fish which are so used, is for the common benefit. "We do not consider the question whether or not Congress would have the right to control the menhaden fisheries which the statute of Massachusetts assumes to control; but we mean to say only that, as the right of control exists in the State, in the absence of the affirmative action of Congress taking such control, the fact that Congress has never assumed control of such fisheries, is persuasive evidence that the right to control them still remains in the State."

The title to commons of fishery seems generally to have been in the State and to have passed to towns through charter grants. In *Robins v. Ackerly*³ it was held that the town of Huntington, L. I.,

¹ 139 U. S. 240.

² Mass. Laws of 1886, chap. 192.

³ 91 N. Y. 98; see *Town of Southampton v. Mecox Bay Oyster Co.*, 116 N. Y. 1; *The People v. Lowndes*, 130 N. Y. 455; N. Y. Penal Code, §§ 411, 640. In Vermont it is unlawful to catch pond pickerel in any of the waters of the State between certain dates. L. Vt. No. 78, 1884; *State v. Goodwin*, 62 Vt. 191; N. Y. R. S. (Birdseye ed.)

had the right, in 1879, to execute the lease of a parcel of land under water in Northport harbor to be exclusively used, occupied and enjoyed by the plaintiff, in the business of planting, growing and cultivating oysters thereon, and that the action for trespass on such rights was maintainable. The New York Penal Code, as do the laws in many of the States, guard the public and private rights of its citizens, and it does not appear that the private rights in private parks and preserves, or these common rights, have been invalidated or interfered with by the national legislation. On the contrary, the purpose and effect of the efforts of both the national and State authorities by fish commissions, fish hatcheries, and the distribution of food fishes has been not alone for the creation or restoration of sources of food supply and the propagation of food fishes, but that therewith pleasure as well as profit should be a matter of consideration.

The regulation of fisheries¹ was at first of the business of the deep sea fishing, but with these new efforts for the public welfare necessarily followed such provisions of law as would prevent interference and secure the result, although at times they should seem arbitrary and severe to individuals who had no other objects in view than their present enjoyment and the ancient freedom of sport.

It is a curious illustration of the changes worked by time, that it has been repeatedly held the Indians had no title which they could grant, and "the fishings, hawkings, huntings, fowlings and all other royalties" passed in the first instance in our country by royal letters-patent, and so lately as April, 1892, the Supreme Court of Maine² held an Indian resident in the State subject to its game laws, saying: "The defendant admittedly killed two deer in this State contrary to the form, letter and spirit of the statute for the preservation of deer and other game animals. The only matter of fact he interposes in defense is that he

p. 2146; *id.* Fish and Game laws, pp. 1178-1212. In New York the manner of fishing is prescribed, and the possession of fish taken contrary to the provisions of the law is evidence of violation. Chap. 127, L. 1884. In Massachusetts wild fowl are not to be pursued with boats impelled by other means than sails, oars or paddles, and *see*, as to eels, lobsters, white perch, oysters, scollops, Mass. Laws 1892, chaps. 74, 102, 186, 188, 196, 408.

¹ See R. S. tit. LI; Act of June 20, 1888, chap. 1; chap. 411, 1888. Fish Commission and chap. 415, 1888, "An act to provide for the protection of the salmon fisheries of Alaska." See *Trustees of Southampton v. Mecox Bay Oyster Co.*, 116 N. Y. 1; *Johnson and Graham's Lessee v. McIntosh*, 8 W. 548; *Martin v. Waddell*, 16 Pet. 408.

² *State v. Newell*, 84 Me. 465.

is an Indian, one of the Passamaquoddy tribe, a tribe living on and near Leweys Island in the eastern part of the State. As to these restrictive statutes he contends they must give way as to him before certain Indian treaties named in the report of the case." The court continues: "These Indians have for many years been without a tribal organization in any political sense. They cannot make war or peace; cannot make treaties; cannot make laws; cannot punish crime; cannot administer even civil justice among themselves. What tribal organization they may have is for tenure of property and the holding of privileges under the laws of the State. They are as completely subject to the State as any other inhabitants can be."

It is also to be observed that game though it be sold in the markets under the restrictions of the law above cited, and undoubtedly as food, subject to sanitary laws, yet never seems to lose its distinctive character, or to be recognized as an article of commerce, subject merely to the ordinary regulations affecting regular food traffic and supply. Hence there is slight reason to expect any conflict in the national and State game laws. The food fish are to be distinguished from game fish, but in respect to both some restrictions apply.¹ A close season for oysters, a limitation in the size of lobsters and fish to be taken, and regulations of fisheries by the national and the different State fish commissions have been prescribed, but the food fish of commerce fall into the ordinary market supply, and at times by exceptions to the law some game fish are added, as in New York city, if taken outside of the State.

Incidentally the game laws have aided the great reform of preventing not only the destruction of forests, but also the pollution of streams. In New York State and in some of the other States, save in this connection, these subjects were entirely neglected. The Rivers Pollution Commission in England, and a like authority in Massachusetts, began the fruitful inquiry which has become a work of necessity and mercy in the legislation of many States, especially for the inhabitants of large cities, but also for many villages of the country, and certainly for the common object of all laws, the good of the people.

In respect to intoxicating liquors Mr. Justice Grier said in the License

¹ See *e. g.* Laws N. Y. 1831, chap. 201; chap. 488, 1892; art. VIII and reports of U. S. Com. of Fish and Fisheries, L. 1887, chap. 498. Lake trout and large mouthed black bass of N. Ca. and Va., if taken outside of the State, may be sold in New York city at any time.

cases' in the U. S. Supreme Court in 1846: "The true question presented by these cases, and one which I am not disposed to evade, is, whether the States have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects and the cause of pauperism and crime. I do not consider the exclusiveness of the power of Congress to regulate commerce as necessarily connected with the decision of this point." The same court in 1873 held that the right to sell intoxicating liquors, so far as such right exists, is not one of the rights growing out of citizenship of the United States.¹ "The court, however, finds that if a case were presented in which a person owning liquor or other property at the time a law was passed by the State absolutely prohibiting any sale of it, it would be a very grave question whether such a law would not be inconsistent with that amendment of the Constitution which forbids the State to deprive any person of life, liberty or property without due course of law." This was the very question raised by the New York case in 1856 in *Wynehamer v. The People*,² the leading case, and almost the only case of authority for the unconstitutionality of the laws on this subject, which go as far as the laws of Iowa,³ and prohibit the manufacture and sale as a beverage of intoxicating drinks, and are sustained under the police power as a prohibition of the use of property clearly within State authority.

Judge Bradley distinguishes in *Bartemeyer's* case an invasion of the right of a citizen to pursue his lawful calling, and "the claim of right to pursue an unlawful calling," which stands on very different grounds, occupying the same platform as does a claim of right to disregard license laws and to usurp public franchises. Mr. Justice Field, concurring in the opinion in this case, says: "The prohibition of sale in any way, or for any use, is quite a different thing from a regulation of the sale or use, so as to protect the health and morals of the community. All property, even the most harmless in its nature, is equally subject to the power of the State in this respect with the most noxious. No one has ever pretended, that I am aware of, that the fourteenth amendment interferes in any respect with the police power of the

¹ 5 How. at p. 631.

² *Bartemeyer v. Iowa*, 18 Wall. 129.

³ 13 N. Y. 378.

⁴ Iowa L. chap. 143, 1884. Code 6, tit. 11; Const. Kansas Amend. 1880, L. Act of Feb. 19, 1881; *Kidd v. Pearson*, 128 U. S. 1; *Mugler v. Kansas*, 123 U. S. 623.

State." Again in 1877¹ this court held that, "as a measure of police regulation looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to the Constitution of the United States." But it was on these two questions, of property rights, and of liquors as articles of commerce, that much further discussion and litigation was to follow.

For the same reason the title of excise law, referring to the control of the subject under police powers, is erroneous from this point of view. As a subject of tax for revenue it would have a different consideration and be referred to another class of laws and decisions. Already it had been said in *Foster v. Kansas*,² by the U. S. Supreme Court, that it was no longer an open question, the constitutionality of prohibition by a State on the lines indicated, but in the original package case, in 1889,³ the U. S. Supreme Court expressed a doubt as to the rule that traffic in an article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed or license required, or the sale prohibited, according to the policy which the State may suppose to be its interest, in the absence of a regulation of commerce, although the barrel of gin sold was an import from another State. The chief justice in the prevailing opinion says: "We are constrained to say that the distinction between subjects in respect to which there can be of necessity only one system or plan of regulation for the whole country, and subjects local in their nature, and so far as relating to commerce mere aids, rather than regulations, does not appear to have been sufficiently recognized. The authority of *Pierce v. New Hampshire*, so far as it rests in the view that the law of New Hampshire (prohibiting the sale of liquor without a license) was valid, because Congress had made no regulation on the subject, must be regarded as distinctly overthrown by the numerous cases hereinafter referred to."

By a divided court it was held that the property in question — barrels and sealed cases of beer manufactured in Peoria, Illinois, and sold and offered for sale at Keokuk, Iowa, by the plaintiffs in error — were improperly seized, and that chapter 6 of title XI of the Code of Iowa, under which the seizure was made, was in contravention of section 8, article 1 of the Constitution of the United States and, therefore, void ;

¹ *Beer Company v. Mass.*, 97 U. S. at p. 33.

² 112 U. S. at p. 206.

³ *Leisy v. Hardin*, 135 U. S. 100.

that a citizen of one State has the right to import beer into another State and sell it there¹ in its original package, and "it is only after the transportation is completed and the property imported is mingled with and becomes part of the general property of the State, by a sale by the importer, that State regulations can act upon it." These doubts were, however, resolved after the passage of a new act of Congress of August 8, 1890, whereby, as stated by the chief justice of the Supreme Court in *Wilkerson v. Rahrer*,² it became the law of the land "that imported liquors or liquids shall, upon arrival in a State, fall into the category of domestic articles of a similar nature," and that "it was within the competency of Congress to provide that certain designated subjects of interstate commerce should be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case. Congress did not use (by the act of August 8, 1890) terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported packages. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within local jurisdiction."

We return to the results of the earlier rule, and State laws may prohibit the sale within State limits of intoxicating liquors, and provide that breweries and distilleries, and places for their manufacture, and places for their sale, may be proceeded against and abated, and the regulations made may also provide for the abatement, as a common nuisance, of the property used for forbidden purposes. "Government," it is said, does not interfere with, nor impair any one's constitutional rights of liberty or of property when it determines that the manufacture and sale of intoxicating drinks for general or individual use as a beverage are, or may become hurtful to society, and constitute, therefore, a business in which no one may lawfully engage."

The question of property is no longer an obstacle, as in the *Wynehamer* case, and the distinction between the cases arising under the police power, or, on the other hand, under the right of eminent domain, is very forcibly stated in *Mugler v. Kansas*, which may now be read as a final decision of a much vexed controversy by the U. S. Supreme Court. Mr. Justice Harlan, delivering the opinion,³ cites, with approval, the opinion of Mr. Justice Grier in the *License* cases, and states

¹ 140 U. S. 545.

² *Mugler v. Kansas*, 123 U. S. 628; *Kidd v. Pearson*, 128 U. S. 1.

³ *Mugler v. Kansas*, 123 U. S. 628.

the conclusion as follows: "It is contended (by the defendants) that as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value if not employed in the manufacture of beer for every purpose,—the prohibition upon their being so employed is, in effect, a taking of property without due process of law. In other words, though the State, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation, having that object in view, cannot be enforced against those who, at the time, happen to own property, the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made. This interpretation of the fourteenth amendment is inadmissible."

"The principle that no person shall be deprived of life, liberty or property without due process of law, has never been regarded as incompatible with the principle, equally vital, that all property is held under the implied obligation that the owner's use of it shall not be injurious to the community.¹ As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation."

"A prohibition upon the use of property for purposes that are declared by valid legislation to be injurious to the health, morals or safety of the community cannot, in any sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it; but it is only a declaration by the State, that its use by any one for certain forbidden purposes is prejudicial to the public interests. The exercise of the police power by the destruction of property, which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. The State having authority to prohibit the manufacture and sale of intoxicating liquors for other than medical, scientific and mechanical purposes, we do not doubt her power to declare that any place kept

¹ Citing *Boston Beer Co. v. Mass.*, 97 U. S. 32; *Patterson v. Kentucky*, 97 U. S. 501; *License Tax cases*, 5 Wall. 462; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659.

and maintained for the illegal manufacture and sale of such liquors shall be deemed a common nuisance and be abated, and at the same time to provide for the indictment and trial of the offender."

The aid of the courts of New Hampshire was refused to recover on a contract of sale out of the State, when the order was taken in the State, and the vendor who brought suit for the price had reasonable cause to believe they were to be transported into the State, and sold there, on the ground that "the rule of comity does not require a people to enforce in their courts any contract injurious to their public rights or which offends their morals or contravenes their policy, in violation of public law." The New Hampshire courts also sustain the State law, that any building in any town or city used for the illegal sale or keeping for sale of spirituous or malt liquors, wine or cider, is a public nuisance.

The restriction of license in the city of Baltimore to citizens of the United States of temperate habits and good moral character to sell liquors by retail, was held by the Court of Appeals of Maryland a valid exercise of police power.¹ In like manner in Vermont it is held an offense to keep intoxicating liquors for sale,² and in Maine an agent or servant who participates in the commission of the misdemeanor of keeping a liquor nuisance is held liable as a principal.³ A hotel in Massachusetts is held to be "a place"⁴ within the meaning of the public statute providing that all business places or tenements used for the illegal keeping or sale of intoxicating liquors shall be deemed a public nuisance, and clubs for dispensing liquors in no license cities are held in the same State⁵ common nuisances. It has, however, been held that the possession by a common carrier⁶ of liquors in transit from another State, though for delivery in the State where prohibitory acts are in force, is under the laws regulating commerce, and State process for their seizure while in this condition is void. Upon this subject, as

¹ *Ives v. Surprise*, 64 N. H. 243; *id.* 603; *State v. Marston*: N. H. Laws 1887 chap. 77; *State v. O'Neil*, 58 Vt. 140; *Com. v. Patten*, 151 Mass. 536.

² *Trageser v. Gray*, 73 Md. 250. "Licenses are for the States to determine." *Alliance v. Joyce*, 49 Ohio, 7; *Miller v. Ammon*, 145 U. S. 421.

³ *State v. Wheeler*, 62 Vt. 489.

⁴ *State v. Sullivan*, 83 Me. 417.

⁵ *Mass. R. S.*, chap. 101, § 6; *Com. v. Purcell*, 154 Mass. 388.

⁶ *Com. v. Baker*, 152 Mass. 337; *see id.* 276, *Com. v. Ryan*.

⁷ *State v. Intox. Liquors*, 88 Me. 158; *Wagner v. Breed*, 29 Neb. 738; *Bowman v. Chicago & N. W. R. R. Co.*, 125 U. S. 465; but *see Wilkerson v. Rahrer*, 140 U. S. 545, and 58 Vt. 140, *affirmed*, *O'Neil v. Vermont*, 144 U. S. 323.

upon that of oleomargarine treated of in this chapter, the impression from the decisions is that, traffic in these articles is not to be regarded as ordinary business.

In *McGahey v. Virginia*,¹ in the opinion of the court, Mr. Justice Bradley remarks, that "licenses for the sale of intoxicating liquors are not only imposed for the purpose of raising revenue, but also for the purpose of regulating the traffic and consumption of these articles; and hence the State may impose such conditions for conducting said traffic as it may deem most for the public good. The manner of payment is part of the condition of the license intended as a regulation of the traffic. It would be very different if the business to be followed was one of the ordinary pursuits of life in which all persons are entitled to engage."

It is in this light we are to view the numerous restrictions in every city, town and State, upon the business and generally upon the property used for it. Liquors are not to be sold to children, nor in proximity to election booths, or a church or place of worship, or a school, nor at night, nor on Sundays, nor at State and county fairs, or in connection with a place of amusement or skating rink, nor are women to be allowed in saloons, nor sometimes are liquors to be retailed where screens shut out the purchaser from passing view.² We can hardly estimate the importance, from a legal standpoint, of the act of Congress of August 8, 1890, and the decisions which followed from the United States Supreme Court, reassuring, we might almost say reestablishing, the autonomy of the States in local subjects of the police law. Thereby intoxicating liquors transported into a State or Territory were declared subject to its local laws enacted in the exercise of its police powers; and Congress was held to have been within the limits of its authority, and neither to have interfered with a regulation of commerce, nor with powers reserved to the States, in providing that

¹ 135 U. S. 662.

² N. Y. Laws 1887, chap. 307; 1889, chap. 170; 1892, chap. 360; 1888, chap. 35; Colorado, 1892; Georgia, 1892; see 140 U. S. 545; 58 Vt. 140, and *O'Neil v. Vermont*, 144 U. S. 823. This latter case touches very nearly another important subject which would seem to have been somewhat neglected, and yet is within judicial cognizance, that of cruel and unusual punishments, against which, Judge Story has said, a constitutional provision would seem to be unnecessary in a free government, and of which Judge Harlan says: "They are inconsistent with the supreme law of the land." See dissenting opinions, *id.* and *Story Const.*, § 1908.

subjects of interstate commerce, should be governed by a rule which divests them of that character at an earlier time, than would otherwise be the case.

This was the unanimous decision in *Wilkerson v. Rahrer*, but the consequences of its extension in any respect are clearly shown in the dissenting opinion of Mr. Justice Field in *O'Neil v. Vermont*, decided April 4, 1892, where he distinguishes the *Rahrer* case from other decisions and says: "The power vested in Congress to regulate commerce was complete in itself, was co-extensive with the subjects on which it acted and could not be stopped at the external boundary of a State; and he adds that a line of decisions of half a century, establish the invalidity of the action of the State of Vermont, in making a sale of goods by a non-resident to its citizens completed on the delivery of the property to them in the State, a penal offense." This apprehension could not be more clearly set forth, but in the State courts other distinctions¹ had been begun. In 1888, in a case arising about the same period as *Leisy v. Hardin*, the Supreme Court of New Jersey had taken decided ground in sustaining, under the State law, the conviction of a vendor of a package of oleomargarine which had been sent by the manufacturers in Indiana to New Jersey for sale, holding that already it had become a part of the general mass of property in the State, and that the Federal law of August 2, 1886, regulating the manufacture of oleomargarine did not legalize the traffic forbidden by the local law.

The power of taxation upon property from another State, although, after arrival, sold from the vessel in which transportation was made without being landed, and for the purpose of being taken out of the country on a vessel bound to a foreign port, had been affirmed by numerous decisions cited here, and in *Leisy v. Hardin*, holding that on arrival it became intermingled with the general property in the State; but there remained the question of the period when this liability should attach. Therefore, in certain other cases, notably in *Maine* and *Massachusetts*, the determination had been of an incomplete delivery, either because the goods were in the hands of the common carrier, or a sale had not been effected.

In the *O'Neil*² case, "where one residing in New York received

¹ *N. J. Act Mar. 22, 1886; Waterbury v. Newton*, 50 N. J. L. 534; *Coe v. Errol*, 116 U. S. 517; *Robbins v. Shelby Taxing District*, 120 U. S. 497; *State v. Intoxicating Liquors*, 88 Me. 158; *Jones v. Surprise*, 64 N. H. 248; *Sternweis v. Stilsing*, 52 N. J. L. 517; *Lyng v. Mich.*, 135 U. S. 161.

² 144 U. S. 823; *Com. v. Zelt*, 188 Pa. St. 615; *Graves v. Johnson*, 156 Mass. 211; *Mullen v. Peck*, 49 Ohio, 447.

orders from persons residing in Rutland, Vermont, for designated small quantities of intoxicating liquors, and he sent such liquors, in jugs or other vessels, with bills of the same for collection by express, to the several persons ordering them, with instructions to the express company not to deliver the packages to the persons addressed until it received pay therefor, the Supreme Court of the State of Vermont decided, on affirming the judgment of the County Court of conviction of the seller for violation of the Vermont law against the sale of intoxicating liquors, that the completed sale in each case was in Vermont, and fell within its statute. The U. S. Supreme Court, on the appeal, said that, "where the State court decided the case upon a ground broad enough to maintain its judgment without considering any Federal question, and no Federal question was presented for its decision nor decided, this court has no jurisdiction to review the State judgment." The opinion of Mr. Justice Blatchford, and his learned and careful analysis of a great number of authorities referred to in this discussion, seem to render the conclusion upon the facts of the case inevitable that "It was entirely immaterial how the liquor sold by O'Neil at Rutland came to be there for sale, whether it was made there, or whether it was brought in some way from the State of New York. The only question was whether it was at Rutland so as to be capable of sale there, and whether it was sold there."

In furtherance of this control of the liquor traffic, as well as to give compensation for other injuries than those of the parties immediately concerned, the Civil Damage Acts have been enacted in many of our States. "That there is or may be a relation," says Mr. Justice Andrews, in the instructive opinion of the New York Court of Appeals,¹ in *Bertholf v. O'Reilly*, in 1878, "in the nature of cause and effect between the act of selling or giving away intoxicating liquors, and the injuries for which a remedy is given is apparent, and upon this relation the legislature has proceeded in enacting the law in question. It is an extension by the legislature of the principle expressed in the maxim "*sic utere tuo ut alienum non laedas*," to cases to which it has not heretofore been applied, and the propriety of such an extension is a legislative and not a judicial question. The right of the legislature to control the use and traffic in intoxicating liquors

¹ 74 N. Y. at p. 524; *Meyer v. Butterbrodt*, Ill. Sup. Ct., May 8, 1898, 34 N. E. R. 152. Where damages to a widow from death of husband drowned while intoxicated were allowed, and the question of the proximate cause is considered "a mixed question of law and of fact." *Edwards v. Woodbury*, 156 Mass. 21.

being established, its authority to impose liabilities upon those who exercise the traffic, for consequential damages to third persons, follows as a necessary incident. And the act of 1873 is not invalid because it creates a right of action and imposes a liability not known to the common law. The legislature may alter or repeal the common law. It may create new offenses, enlarge the scope of civil remedies, and fasten responsibility for injuries upon persons against which the common law gives no remedy. We do not mean that the legislature may impose upon one man liability for an injury suffered by another with whom he had no connection. But it may change the rule of the common law which looks only to the proximate cause of the mischief in attaching legal responsibility, and allow a recovery to be had against those whose acts contributed, although remotely, to produce it. It may prohibit the selling or giving away of liquors, or it may, while not interfering with the liberty of sale or use, guard against the damages of an indiscriminate traffic, and induce caution on the part of those who are in the business, by subjecting them to liabilities for consequential injuries."

The defendant in this case was, when the act was passed, the owner of a hotel building and premises. In June, 1875, he leased them, knowing that one Firnhaber intended to occupy the building and sell intoxicating liquors therein. On Sunday, July 18, 1875, the plaintiff's son, with his knowledge, took his horse and buggy to drive four miles away on some business, but, instead, drove to the hotel and drank several times at the bar, and after leaving for another place returned and again drank, becoming intoxicated, and in the evening proceeded to plaintiff's house, where he lived, and soon after the horse died, as the jury found, from over-driving, and this treatment was caused by the son's intoxication.

The court says: "It cannot be disputed that the facts found bring the case within the terms of the statute and authorize the recovery, if the law itself is valid. The act gives to every husband, wife, parent, guardian, employer, or other person "who shall be injured in person or property or means of support by any intoxicated person, or in consequence of the intoxication" of any person, a right of action against any person who shall, by selling or giving away intoxicating liquors, have caused the intoxication, in whole or in part, and declares that

¹ 74 N. Y. at pp. 512, 518; *Graves v. Johnson*, 156 Mass. 211; *Mullen v. Peck*, 49 Ohio, 447.

"any person or persons owning or renting or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold thereon, shall be liable, severally and jointly, with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained and for exemplary damages." All the elements of the landlord's liability under the act exist in this case, viz.: The leasing of premises with knowledge that intoxicating liquors were to be sold thereon; the sale by the tenant, producing intoxication; and the act of the intoxicated person, causing injury to the property of the plaintiff." Sustaining the constitutionality of the act the opinion in this far-reaching decision proceeds: "The liability imposed upon the landlord for the acts of the tenant is not a new principle in legislation."

In *Dobbins v. The United States*,¹ a distillery, with the real and personal property used in connection therewith, had been seized and condemned to be forfeited for the violation, by a lessee, of certain provisions of an act of Congress, regulating the business of distilling. No fraud was imputed to the owner of the premises, and he was not charged with any complicity with the tenant in violating the law. The owner objected that his property could not be forfeited for the acts of the tenant, committed without his knowledge or consent. But the court affirmed the decree of condemnation, and in his opinion Clifford, J., says: "The legal conclusion must be that the unlawful acts of the distiller bind the owner of the property, in respect to the management of the same, as much as if they were committed by the owner himself."

In a later case² it was said that "while a statute of this character should not be enlarged, it should be interpreted, where the language is clear and explicit, according to its true intent and meaning, having in view the evil to be remedied and the object to be attained. The evident object was to suppress the sale and use of intoxicating liquors and to punish those who, in any form, furnished means of intoxication, by making them liable for damages which might arise, caused by the parties who furnished such means." This was held to include the loss of support to the widow of a man where his death was a result necessarily following and attributable to his intoxication. A married woman who owned the building in which intoxicating

¹ 96 U. S. 395.

² *Mead v. Stratton*, 87 N. Y. at p. 496; see, also, *Schroeder v. Crawford*, 94 Ill. 357; *Hackett v. Swelsey*, 77 Ill. 109; *Roose v. Perkins*, 9 Neb. 304; *Rafferty v. Buckman*, 46 Iowa, 195; *Tate v. Donovan*, 143 Mass. 590; *Taylor v. Carroll*, 145 Mass. 95.

liquors were sold by her husband, and who had knowledge that such business was carried on by him, was held liable under the act. When the person¹ intoxicated is killed in an affray, or death results from other causes, distinctions are drawn by some of the courts, and in Ohio² and Indiana the event of death was said to prevent a recovery.

Changes in these laws are not infrequent in the different States, but throughout the legislation on this subject the power of the legislature to make such provisions has almost, without exception, been sustained by the courts, and the variance in decisions has depended more upon the difference in the language of the several statutes than in the application of the principle involved. In New York State it was held that the plaintiff could not recover in the absence of proof,³ that the services of a minor son were necessary to his support, and that exemplary damages are not recoverable, except upon proof of aggravating circumstances with which the defendant is connected. "The statute⁴ creates new causes of action for acts which are made wrongs, and stamps them with the same character as other wrongs, making them subject to the existing rules governing damages in actions."

At the same term a majority decision of the same division of the New York court curiously extends the subject of judicial cognizance in *Blatz v. Rohrback*,⁵ stating that many of the beverages sold under the name of beer are not intoxicating, and the court may indulge in no presumptions except as to the innocence of the accused. The authority cited, however, of *Rau v. The People*, in 1875, is more favorable to the law, and held that, upon a trial of an indictment for a violation of the prohibition of the excise law, where it was proved that the accused sold lager beer, and evidence was given tending to show that lager beer was intoxicating, a charge to the jury, that if they found it to be intoxicating, they should convict, was not error.

The same court held to strictness of proof of the proximate cause of the injury in a late case,⁶ and a number of decisions enforce this rule.

¹ *Shugart v. Egan*, 88 Ill. 56; *Schmidt v. Mitchell*, 84 Ill. 195.

² *Davis v. Justice*, 31 Ohio, 359; *Kirchner v. Myers*, 35 Ohio, 85; *Krach v. Hellman*, 53 Ind. 517; *Collier v. Early*, 54 Ind. 559.

³ *Volans v. Owen*, 74 N. Y. 526.

⁴ *Reid v. Terwilliger*, 116 N. Y. 530.

⁵ 116 N. Y. 450.

⁶ 68 N. Y. 277.

⁷ *Dudley v. Parker*, 132 N. Y. 386; *Steele v. Thompson*, 42 Mich. 594; *Peacock v. Oaks*, 85 Mich. 578; *Shugart v. Egan*, 88 Ill. 56; *Collier v. Early*, 54 Ind. 559; *Schmidt v. Mitchell*, 84 Ill. 195; *Kirchner v. Myers*, 35 Ohio, 85.

It is, however, construed by the New York Court of Appeals as not to require proof, that the act of the intoxicated person was the natural, reasonable or probable consequence of his intoxication.¹ "It is sufficient, if it appears that the act was done while the person was intoxicated, in whole or in part, by liquors sold by the defendant. In an Indiana² case the wife recovered for injuries to both her husband and herself when he was unable to manage his horses through intoxication, and refused to let his wife have the reins, and meeting with an accident in consequence, it was held the sale of liquor to him was the proximate cause. In New Hampshire evidence of frequent intoxication of the deceased during the five years preceding was admitted,³ and the widow's action for damages sustained. The person selling liquor in violation of the law was held liable for all the damage. In Nebraska the widow and children may join in the action, and in case of death all those who have furnished the deceased liquor are liable.⁴ A license is no protection. In Michigan exemplary damages are only recoverable where the act of giving or selling liquor was willful, reckless or deserving of punishment beyond mere compensation, and unless notice was given. And the New York statute of 1892, requiring notice to be given, will have the same effect."⁵ In *Rafferty v. Buckman* the Iowa court held that it was no defense that the wife had sometimes bought liquor for the deceased, and in that State exemplary damages are recoverable by the wife.⁶ In Indiana⁷ it was held a misdemeanor to give a glass of intoxicating liquor to a person under twenty-one years of age, and an ordinance of the town of Monticello, prohibiting sales of intoxicating drinks, was held valid.

In the recent case of *Hall v. Germain* the court charged⁸ that if the liquor sold to the deceased contributed in the slightest degree to his intoxication, and such intoxication resulted in the injury complained of, the case was within the statute, and sustained the judgment on the appeal. The owner of the building was held liable to the widow in this action, because the knowledge of his agent in permitting the occu-

¹ *Neu v. McKechnie*, 95 N. Y. 632.

² *Mulcahey v. Givens*, 115 Ind. 286.

³ *Squires v. Young*, 58 N. H. 192; *Bedore v. Newton*, 54 N. H. 117.

⁴ *Roose v. Perkins*, 9 Neb. 304; and see 74 N. Y. 518.

⁵ *Kreiter v. Nichols*, 28 Mich. 497; *Steele v. Thompson*, 42 Mich. 594; N. Y. L., chap. 403, 1892; see *Tate v. Donovan*, 143 Mass. 590.

⁶ 46 Iowa, 195; *Fox v. Wunderlich*, 64 Iowa, 187.

⁷ *Toffer v. State*, 118 Ind. 110; *Vinson v. Monticello*, 118 Ind. 103; *id.* 598.

⁸ *Hall v. Germain*, 131 N. Y. 536; see, also, 88 Me. 417; 9 Neb. 304.

pation of the premises for the sale of liquors after the expiration of the lease was imputable to him, even though he had no actual knowledge, and proof on his part had been refused, that when the lease was first made the tenant had agreed not to sell intoxicating liquors. The recovery was also against the agent, but the question of his liability was not directly raised.

That oleomargarine is subject to, and an example of, the restraining force of the police powers of a State, many decisions in a number of the States plainly disclose, and they resolve, rather by reliance upon the wisdom of the legislature than by illustration of familiar legal principles, the two questions very forcibly presented in the dissenting opinion of Mr. Justice Field in *Powell v. Pennsylvania*¹: "First, whether a State can lawfully prohibit the manufacture of a healthy and nutritious article of food designed to take the place of butter out of any oleaginous substance or compound of the same other than that produced by pure milk or cream and its sale when manufactured; and second, whether a State can, without compensation to the owner, prohibit the sale of an article of food, in itself healthy and nutritious, which has been manufactured in accordance with its laws."

The statute law of Pennsylvania in 1878 permitted this manufacture, but in 1885 it was prohibited, and every sale made of the prohibited article or substance, after the new act took effect, was deemed to be unlawful and void. This was held by the United States Supreme Court to be a legitimate exercise of the police power of the State, with which it could not or should not interfere. The State courts have, however, used more freedom, and discriminated between arbitrary legislation in abridgment of an industry not injurious to the community and not fraudulently conducted, and laws such as have been sustained in New York State and Massachusetts, which do not prohibit commerce in oleomargarine, but prohibit deception in its sale in the State for butter. It was for the latter object the law of the United States of August 2, 1886, was passed, requiring that each package should have a label showing it was oleomargarine legally manufactured. The Court of Appeals in New York had declared the law of 1884 unconstitutional, because the prohibition was not limited² to unwholesome or simulated substitutes, but absolutely prohibited the manufacture or sale of any compound, designed to be used for butter or cheese, how-

¹ 127 U. S. 678.

² 24 U. S. Stat., chap. 840, § 7; *People v. Marx*, 99 N. Y. 377.

ever wholesome, valuable or cheap, and however openly and fairly the character of the substitute was avowed and published.

Subsequent acts in New York and throughout the country avoided this difficulty, save in New Hampshire, where the law to accomplish the same result required imitation butter to be colored pink. Many other laws forbid it to be colored yellow, in exaggeration of its natural tint, and the argument of the defendant in *State v. Marshall* contends, that this assumption of authority to compel the addition of a foreign substance to oleomargarine, a wholesome and nutritious article of food, so that it be degraded and subject to ridicule, is an invasion of his right to carry on a lawful industrial pursuit.¹ The court rests upon the presumption of the constitutionality of a statute, and the reference to the provision in the Constitution for all manner of wholesome and reasonable laws, and affirming the judgment cites, among other authorities, the New York case of *People v. Cipperly*,² decided upon the dissenting opinion of Mr. Justice Learned in the court below, who speaks of the uncertain limits of the police powers and says: "In *Bertholf v. O'Reilly*, the Court of Appeals asserted that the legislative power had no other limitation than the constitutional restraints and limitations, and that laws cannot be declared void because they are opposed to natural justice."

The law of 1885, to prevent deception in the sale of dairy products, was sustained by the same court,³ and the opinion of Mr. Justice Rapallo advances the argument, "as it is claimed, that butter made from animal fat or oil is as wholesome, nutritious and suitable for food as dairy butter; that it is composed of the same elements and is substantially the same article, except as regards its origin. If it possesses the merits which are claimed for it, and is innocuous, those making and dealing in it should be protected in the enjoyment of liberty in those respects, but they may legally be required to sell it for, and as what it actually is, and upon its own merits, and are not entitled to the benefit of any additional market value, which may be imparted to it, by resorting to artificial means to make it resemble dairy butter in appearance."

The opinion includes two suggestions which, from so high an authority, are entitled to consideration, that "if all these precautions fail to prevent deception of consumers, then it is lawful to require that, in

¹ 64 N. H. 549; N. H. Laws 1885, chap. 68.

² 101 N. Y. 634, reversing 87 Hun, 319.

³ N. Y. Laws 1885, chap. 183; *People v. Arensberg*, 105 N. Y. 123, 129.

the manufacture of the substance itself, some measure should be adopted to make it distinguishable, in appearance, from the ordinary dairy butter, such as by giving it a different color, or some other device." Again, "such prohibition is within the power of the legislature, and rests upon the same principle which would sustain a prohibition of coloring winter dairy butter for the purpose of enhancing its market value by making it resemble summer dairy butter, should the legislature deem such a prohibition necessary or expedient." In a later decision,¹ the court said: "The constitutionality of the statute in question is not now an open question," and this doctrine of the right to prevent deception by all reasonable means, as well as that of protection to the public health, is almost without exception at the present day.

In a somewhat new form, however, the line of demarcation is presented in a very recent case between rightful subjects of commerce free from State interference until exclusively within the local jurisdiction, and articles which lose that character when viewed as dangerous to the community, and no longer belonging to ordinary traffic, are brought within the safeguards of legislative action. Under the Massachusetts statute of 1891, "to prevent deception in the manufacture and sale of imitation butter," the defendants, Huntley and Plumley, were convicted of making sales of oleomargarine, and on appeal to the Supreme Court of that State raised the constitutional questions in May, 1892.² The act wholly prohibited, under a penalty, the manufacture or sale, or offering or exposing for sale, or having in possession, with intent to sell, oleomargarine in imitation of yellow butter produced from pure unadulterated milk or cream, but did not prohibit its sale or manufacture "in a separate and distinct form, and in such manner as will advise the consumer of its real character." It was agreed that the defendants sold an article forbidden by the statute; that oleomargarine has naturally a light yellowish color, and that the article sold was artificially colored in imitation of yellow butter. The court says: "We are to assume that the

¹ *People v. Briggs*, 114 N. Y. 61; *Butler v. Chambers*, 36 Minn. 69; *State v. Addington*, 77 Mo. 120; 50 N. J. L. 534; *Com. v. Gray*, 150 Mass. 327; *Powell v. Com.*, 114 Pa. St. 265; *Com. v. Schollenberger* (Pa.), 27 Atl. R. 30.

² *Pub. Stat. Mass.* 1891, chaps. 58, 412; *Com. v. Huntley*; *In re Plumley*, *Mass. Sup. Jud. Ct.*, May 9, 1892, 156 Mass. 236. Retail sales made by a local agent for a principal out of the State are within the prohibition of the State law, and although the packages are unbroken they are not necessarily articles of interstate commerce. *Com. v. Schollenberger*, 27 Atl. R. 30; see *Com. v. Zelt*, 138 Pa. St. 615; *Graves v. Johnson*, 156 Mass. 211.

oleomargarine sold by the petitioner was wholesome, palatable and nutritious," and many of the decisions of the State tribunals and of the United States Supreme Court are passed in review. The majority of the court decide in favor of the law and say: "But all we have to deal with at present is the particular question before us. The legislature, while allowing the sale of oleomargarine in such forms as will indicate its real character to the consumer, has determined that its manufacture and sale, when it is made in imitation of yellow butter, is so productive of deception and fraud as to call for a prohibition of such manufacture and sale. The mischief has been found here. It may or it may not exist in equal force elsewhere. If the statute under consideration has assumed to forbid the sale of all oleomargarine, a far different question will be presented."

The decision rests upon the limitation of the operation of the statute to oleomargarine which is in imitation of yellow butter and, therefore, of a deceptive character. The dissenting opinion treats the act as an interference with commerce, and holds that "the prevention of fraud is recognized as a ground for the exercise of the police power, but the possibility that persons may be deceived in the qualities of goods which they buy, furnishes the least important of all the reasons for protective legislation. If it is a proper article of commercial traffic, our legislature had no jurisdiction to legislate against the importation and sale of it in the original packages. Upon the question at issue we have the opinion of Congress expressed in the act of August 2, 1886, which makes the manufacture and sale of oleomargarine a source of internal revenue to the United States." A further argument is used that in *Eaton's case* the Supreme Court of the United States has held that oleomargarine is a legitimate subject of commerce.¹ The opinion concludes in admitting that "stringent laws should be passed to prevent frauds in the sale of it," and while this principle is adhered to, the presumption of wise precautions taken by the legislature will doubtless prevail, as has been shown in the decisions previously mentioned.

¹ The case of *United States v. Eaton*, 144 U. S. 591, is interesting in this connection in respect to the enforcement of the United States oleomargarine law and the powers of the internal revenue officers. It holds the dealer not liable for disobedience to mere regulations and that there was no statutory authority to compel him to keep a book showing receipts and disposition of oleomargarine in detail, to whom sold, and to make monthly returns thereof to the collector of internal revenue. Furthermore, that there are no common-law offenses against the United States.

CHAPTER VI.

HEALTH AND QUARANTINE LAWS.

Health and quarantine are immediately recognized as of the domain of police powers and laws. Quarantine, as a means of assuring the public safety, is one of the most ancient and formidable prescriptions of government of every form, and barbaric or civilized, it indicates a sacrifice of individual rights, to what often seems an irresponsible authority. The general subject, on the other hand, of the public health has enlisted the greatest wisdom, the use of every science, and the widest experience in its behalf, but equally refers most provisions rather to discretion and reason, than to exact definitions under fixed laws. It is of this necessity, for no one can foresee accurately the quarter, the time, the description, of the dangers against which there must be a defense, nor when their approach is signaled can there be hesitation, the possibility of a revolt, or an opportunity to call for a council or legislature to determine by statute what shall be the appropriate and adequate action. Naturally some details can be prearranged, and experience warns every State and every locality of its peculiar perils. Laws may establish reasonable barriers, and room is left for ordinances and regulations of local administrations enforced in self-defense, and many of them exclusively within the local province; but generally powers are delegated by the sovereign State to boards and officers, who are to take cognizance of every thing relating to this subject, and to exercise discretionary authority of great efficiency and of the highest importance.

We read in Blackstone's Commentaries on the laws of England, that among the offenses especially affecting the commonwealth "are such as are against the public health or the nation; a concern of the highest importance, and for the preservation of which there are in many countries special magistrates or curators appointed. The first of these offenses is a felony, but by the blessings of Providence for more than a century past, incapable of being committed in this nation, for by statutes it is enacted that if any person infected with the plague

or dwelling in any infected house, be commanded by the mayor or constable, or other head officer of his town or vill, to keep his house, and shall venture to disobey it, he may be enforced by the watchmen, appointed on such melancholy occasions, to obey such necessary command; and if any hurt ensue by such enforcement, the watchmen are thereby indemnified." By later statutes the method of performing quarantine or forty days' probation by ships coming from infected countries, is put in a much more regular and effectual order than formerly, and masters of ships coming from infected places and disobeying the directions there given, or having the plague on board and concealing it, are guilty of felony without benefit of clergy. The same penalty also attends persons escaping from the lazarets, or places wherein quarantine is to be performed; and officers and watchmen neglecting their duty, and persons conveying goods or letters from ships performing quarantine."

State quarantine laws have been held in the United States to be within the powers reserved under the Constitution of the United States, and not conferred upon the general government. Doubt of their validity, when regulations of commerce may be indirectly affected, has been avoided by the acts of Congress which require their observance.¹ There have arisen, however, questions which concern not so much the inhabitants of a single State, as the people of the United States, especially growing out of immigration and importations, which are subjects belonging to the general legislation and the regulation of commerce, including interstate commerce.

A national quarantine, therefore, must differ greatly from State and local quarantine. It reaches only immigrants and importations, and

¹ 4 Blackst. Com. 161 and notes; Burns, J., tit. Plague, 1 Jac. I, chaps. 31, 29; Geo. II, chap. 8. Prior quarantine laws were repealed by 6 Geo. IV, chap. 78, which made other provisions of a like character. It is a misdemeanor at common law to expose a person laboring under an infectious disorder, as the small-pox, in the streets or other public places. 4 M. & S. 73, 272. By 16 & 17 Vict., chap. 100, § 9, failure to have a child vaccinated, after notice, was punishable by a fine.

² U. S. R. S., tit. 58; *Morgan v. Louisiana*, 118 U. S. 464, 465; *Gibbons v. Ogden*, 9 W. 204. Chief Justice Marshall, quoted in *Crutcher v. Kentucky*, 141 U. S. 47, says: "Indeed, the laws of the United States expressly sanction the health laws of a State." In *Escanaba Co. v. Chicago*, 107 U. S. at p. 687, the opinion of the court states: "The more general doctrine now firmly established that the commercial power of Congress is exclusive of the State authority only when the subjects upon which it is exercised are national in their character, and admit and require uniformity or regulation affecting alike all the States." *County of Mobile v. Kimball*, 102 U. S. 696, 697; *Wilkerson v. Rahrer*, 140 U. S. 545.

transit and traffic between the States. Conditions of entrance into the country are readily imposed and readily enforced. They embrace detention, inspection and disinfection. In like manner, articles or animals for exportation, as they affect the trade of the country, may be regulated, and, as we have seen in a previous chapter, the United States has taken long steps in advance, consistent with the action of other countries, in the laws enacted particularly for the inspection of meats and of food animals. Again, in the Bureau of Animal Industry, the United States has, even within the States, undertaken the prevention of dangers from pleuro-pneumonia in cattle, and from other animal diseases, and required pork and beef to pass inspection before they are allowed to be sent abroad. Dangerous persons are debarred, and the laws passed excluding contract laborers, Chinese and coolies, are evidence of functions assumed by the general government' in new directions, but based upon two general principles familiar to us in the decisions of the courts, and approved by experience. First. That whatever is necessary to complete the power of Congress to regulate commerce is a necessary consequence, and falls within the same authority. Second. That, in the same connection, safeguards and prevention of dangers to the welfare of the nation are necessary incidents to the exercise of powers of self-defense, inherent in every sovereignty.

At the same time, persons sick or infected with contagious disease, and articles unwholesome, unfit for food or dangerous from infection, are not proper subjects of commerce, and are beyond the ordinary rules of its regulation, so that, with regard to them, no interference between the powers of the States and those of Congress should be made matter of question or of apprehension.

No difficulty occurs as to the agencies to be employed, for the same legislative authority which creates them, devises the law of their guidance, and we look to the statute to find the directions, by which all concerned are to be governed. Thus, under the law of 1891, amending the laws regulating immigration, the United States Marine Hospital Service, under the directions of the Secretary of the Treasury, with

¹ See chap. 3, and notes pp. 22, 24, 25. See Supp. U. S. R. S. 435, "An act for the establishment of a Bureau of Animal Industry; also act Mar. 3, 1891, 26 Stat. 1089; also an act in amendment of the various acts relative to the immigration and importation of aliens, under contract or agreement, to perform labor, Mar. 3, 1891, chap. 551; 26 Stat. 1094; *Lelsy v. Hardin*, 135 U. S. 100; *Gibbons v. Ogden*, 9 Wh. 204, 229; *Wan Shing v. U. S.*, 140 U. S. 424; *Chae Chang Ping v. U. S.*; *The Chinese Exclusion Cases*, 180 U. S. 581, and act of Congress, May 5, 1892.

the approval of the President, formulates the regulations of national quarantine.

The collectors of ports arrest the entrance of forbidden persons and things, and the United States may have quarantine stations, as it had one at Sandy Hook in New York harbor in 1892. Likewise articles, such as rags, may be forbidden entrance, or given entry only under certain conditions.¹ The custom-house is the only gate through which importations can enter, and thus an effectual bar is instituted which will be opened for dangerous articles only in the way provided by the authority conferred by Congress. Once passed by the custom-house, local health authorities have over them a jurisdiction which assures the safety of their own communities, and this has not so far been circumscribed by either adverse legislation or unfavorable decisions. What concerns interstate commerce has not been so definitely settled, and the need, rather than the means, of preventing exposure to peril from pestilence and infection through this source, has been foreseen more recently than with regard to foreign trade.

Quarantine laws, says Mr. Justice Miller in *Morgan v. Louisiana*,² "belong to that class of legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and are valid until displaced or controverted by some legislation of Congress." The day would seem far distant when the State laws should be abrogated by, or found inconsistent with, acts of Congress undertaking to provide a general system of quarantine, and partly

¹ See opinions of U. S. Attorney-General, September 1 and 10, 1892, and Circular of the Treasury Department Office of the Supervising Surgeon-General U. S. Marine Hospital Service, Washington, September 1, 1892, as to quarantine restrictions upon immigration to aid in the prevention of the introduction of cholera into the United States. As to importation of rags, see U. S. Treasury Circulars, November and December, 1884; August, 1892; *Lockwood v. Bartlett*, 130 N. Y. 340; *Train v. Boston Disinfecting Co.*, 144 Mass. 523. The National Board of Health was organized in 1878, and in 1881 maintained quarantine stations at Ship Island, Sapelo Sound, and on the Virginia coast. The law of August 1, 1888, chap. 727, "An act to perfect the Quarantine Service of the United States," directs the establishment of a number of quarantine stations by the Secretary of the Treasury, to be conducted by the Marine Hospital Service under regulations formed in accordance with the act of April 29, 1878. And by this last-mentioned law it was made the duty of the medical officers of the Marine Hospital Service and of custom officers to act in the enforcement of the national quarantine rules and regulations. The Navy Department also furnishes necessary assistance when called upon. See joint resolution of Congress, June 4, 1879. Further national legislation became necessary, and the act of February 15, 1893, establishing a national quarantine, was passed.

² 118 U. S. 465.

because of the reason given in the same opinion that "the matter is one in which the rules that should govern it may, in many respects, be different in different localities, and for that reason better understood and more wisely established by local authorities." Other reasons, however, intervene, and the United States Supreme Court has very carefully distinguished the cases wherein State laws passed under the claim of authority of police power are not confined to the local jurisdiction, are not proper health laws and interfere with the rights and powers of the Federal government.

This was the criticism in the *Passenger cases*,¹ in *Railroad Company v. Husen*, *Minnesota v. Barber*, and a number of decisions previously discussed, but in a much larger number of cases the right of a State to regulate its own internal affairs, and enforce those laws which are self-defensive, has been very clearly asserted and maintained. Thus, in the *City of New York v. Miln*, it was held that the State law inflicting a penalty on the master of a vessel, for neglecting to report an account of his passengers, is not a regulation of commerce, but of police, and is not in conflict with the Constitution of the United States. And the same court in *Leisy v. Hardin*,² citing *Cooley v. Port Wardens of Philadelphia*, maintains the proposition that "simply local powers have full operation until circumscribed by the action of Congress in effectuation of the general power." Also in *Budd v. State of New York* it is held that "the statute in question is a regulation of commerce only within the limits of that State," and for this reason it is not obnoxious as a regulation of interstate commerce; and the same rule prevails to sustain the State law in *Sands v. Manistee River Land Company*³ and in *Powell v. Pennsylvania*, *Patterson v. Kentucky*, and *Mugler v. Kansas*.

The Massachusetts court says in *Commonwealth v. Huntley*,⁴ "it is always conceded that States may pass laws to prevent the introduction, within their limits, of certain kinds of articles," and supports this statement with a careful review of many cases, dwelling at some length on the prohibitions under quarantine laws, which depend not alone on these principles of local and reserved powers, but on the necessity for protection of the public health within State lines, and upon the distinction carefully drawn by the United States Supreme Court in Rail-

¹ 11 Pet. 102.

² 135 U. S. 109; 12 How. 299.

³ 123 U. S. 288; 127 U. S. 678; 97 U. S. 501; 123 U. S. 623; *R. R. Co. v. Husen*, 95 U. S. 465; *Bowman v. Railway*, 125 U. S. 465; *Leisy v. Hardin*, 135 U. S. 100.

⁴ 156 Mass. 286.

road v. Husen, Bowman v. Railway Company, Leisy v. Hardin, and Rahrer's case, quoting this language of the court: "Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence and death, such as rags or other substances affected with the germs of yellow fever or the virus of small-pox, or cattle or meat, or other provisions that are decayed, or otherwise, from their condition and quality, unfit for human use and consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce," and adds that "the right to exclude persons afflicted by contagious or infectious diseases was also fully recognized."

In Railroad v. Husen the opinion of the court declares that "we admit that the deposit in Congress of the power to regulate foreign commerce among the States was not a surrender of that which may properly be denominated police power. Under it a State may exclude persons afflicted by contagious or infectious diseases; a right founded, as intimated in the Passenger cases, on the sacred law of self-defense." It is not difficult to reconcile these express declarations of authority in the States to maintain their own quarantine with the explanation of the opinion of Mr. Chief Justice Fuller, in Leisy v. Hardin, that "the power vested in Congress is co-extensive with the subject on which it acts and cannot be stopped at the external boundary of a State, but must enter its interior. Both national quarantine and State quarantine may legally continue to exist, and the supremacy of either, upon the subjects within the limits of its control, may be maintained without infringement upon constitutional rights.

An almost endless variety of cases adjudicated upon the peculiar facts represented in each controversy, illustrate the difficulty, very often expressed in the opinions of the highest courts, of defining and limiting, in advance or in any general way, the extent and subjects of the power. As an incident of the power, a State may use means to ascertain the facts on which will depend the validity of regulation, and here, adds the opinion of the court in Bowman v. Chicago & N. W. R. R. Co.,¹ "is the limit between the sovereign power of the State

¹ 125 U. S. 465. In Wabash, etc., R. R. Co. v. Illinois, 118 U. S. at p. 571, the remark in a former opinion is quoted: "Under such circumstances it would be a useless task to undertake to fix an arbitrary rule by which the line must, in all cases, be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved."

and the Federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State, and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this court in the cases of *Gibbons v. Ogden*, *Brown v. Maryland*, and *New York v. Miln*." To make this classification effective, we must place outside of commercial regulations persons afflicted with contagious or infectious diseases, as well as articles and animals which are unmerchable, and may be excluded under the right of self-defense, because they may bring in disease, pestilence and death. Again, we are met with a decision showing the discrimination needful to support the law of a State challenged as extending beyond the right of examination and inspection, and held to invade the right of Congress to regulate commerce with foreign nations.

In *Chy Lung v. Freeman*¹ a statute of California was the subject of consideration which differed from others, in that a bond was required for certain classes of passengers, and that the Commissioner of Immigration was to satisfy himself that, any person arriving from a foreign port was a proper person to land. The opinion of the court was that this right of protection "can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity." And further, that this California statute passed "so far beyond what was necessary, or even appropriate for this purpose as to be wholly without any sound definition of the right under which it is supposed to be justified." In the Chinese Exclusion² cases and *Wan Shing v. United States*, notwithstanding some of these objectionable features, and "although the act of Congress of 1888 is in contravention of the express stipulation of the treaty of 1868, and of the supplemental treaty of 1880 (with China), the United States law was held to be valid, and not to be restricted in its enforcement. And further, that the question whether our government is justified in disregarding its engagement with another nation is not one for the determination of the courts."

A municipality may at any time be involved in a contention for its self-defensive rights.

¹ 92 U. S. 280; and see *Henderson case*, id. 259.

² 130 U. S. 581; 140 U. S. 424; see cases under the Geary Act, and especially *Fong Yue Ting*, 149 U. S. 698.

The Sanitary Code in force in the city of New York regulates removals from and unloading of vessels; requires notice from vessels of any infected article or person; forbids unloading at any dock, building or pier, or storage in the dwelling portions of the city, of certain articles, except under a permit from the city health department;¹ and forbids "any vessel, or person, or thing, therein or therefrom, having been in quarantine, to come or to be brought 'within three hundred and fifty feet of any dock, or pier, or building in the city of New York without the permit of the health department;' and orders 'that no person shall bring into this city, from any infected place or land, or take therein, from any vessel lately from any infected port, or from any vessel or building, in which had lately been any person sick of a contagious disease, any article or person whatever, nor shall any such person land or come into said city without a permit of this department (of health);' and it shall be no excuse that such person or article, so offending, or the occasion of offense, has passed through quarantine or has a permit from any other source than this department of health." (Health Department of the City of New York.)

The law of New York State, not infrequently enforced, gives the power to the Board of Health in New York, and the same power to Brooklyn, "to order any vessel at the wharves of the city or its vicinity to the quarantine ground, and (to) require all persons or things introduced into either city from such vessels to be seized, returned on board thereof, or removed to the quarantine or place of safety."²

These laws may be enforced both civilly and criminally, and the public officers may employ the necessary agents and assistance to secure compliance with their orders. No question has ever been successfully raised as to these powers. In this delegation of police power from the State to the municipality, it has been held the State did not part with it, or the duty of protecting the public health.³ No general power in

¹ Sanitary Code of New York, §§ 139-145; *Minn. St. P. S. S. R. Co. v. Milner*, 57 Fed. R. 276.

² As to Board of Health powers and the Sanitary Code, see *Polinsky v. People*, 73 N. Y. 65; as to quarantine disinfection, etc., *Lockwood v. Bartlett*, 130 N. Y. 340; *Train v. Boston Disinfecting Co.*, 144 Mass. 578.

³ *Stein v. Bienville Water Supply Co.*, 34 Fed. R. 145, and 141 U. S. 67; *Hutton v. City of Camden*, 39 N. J. L. 122; *Manhattan Fertilizing Co. v. Van Keuren*, 8 C. E. Green, 257; *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, id. 705. A municipal ordinance regulating the establishment of public wash-houses and prohibiting washing and ironing within certain hours within certain limits was sustained by the State and the United States courts. *Fertilizing Co. v. Hyde Park*, 97 U. S.

a common council, to declare any thing a public nuisance, has support in New Jersey, but in California the city ordinances of San Francisco have had this effect, and have been sustained. A restriction is placed upon a too liberal interpretation of such grant of powers by the United States Supreme Court in *Yick Wo v. Hopkins*, in the rule that "in a suit brought from a State court, which involves the constitutionality of ordinances made by a municipal corporation, the court will, when necessary, put its own independent construction on the ordinances." The court held in that case, that "an administration of a municipal ordinance for the carrying on of a lawful business within the corporate limits, violates the provisions of the Constitution of the United States, if it makes arbitrary and unjust discriminations founded on differences of race between persons otherwise in similar circumstances."

It is evident that the obligations and authority imposed by the laws under discussion are territorial in their effect, and for any acts or omissions declared to be offenses there must be a sufficient statutory authority. In New York the health officer is limited to the port,¹ the Board of Health to the city, and over the waters of the bay up to and within quarantine limits, and also under the laws commissioning the Board of Health of the city of New York, it is required to use all reasonable means for ascertaining the existence and cause of disease or peril to life and health and to cause all proper information in its possession to be sent to the local health authorities of any city, village or town in the State that may request the same, and it may gather such information and facts from other parts of the State and may, in its discretion, prohibit or regulate the internal intercourse by land or water and an infected place. Similar provisions affect other State health officers, and the rule applied in *United States v. Eaton*,² respecting their requirements, will define their jurisdiction. This local and limited authority was

659; *Coates v. Mayor*, 7 Cow. 585. As to violations of quarantine regulations and laws, see Penal Code of the State of New York, §§ 391-397; see, also, 57 Fed. R. 276.

¹ 118 U. S. 356.

² N. Y. Laws, chap. 353, 1863; N. Y. Laws 1892, chap. 486; Laws 1866, chap. 74; Laws 1867, chap. 956; N. Y. Cons. Act of 1882, §§ 533, 571, 572, 558. The health officer is appointed "for the port of New York" and, except as *ex-officio* one of the Commissioners of the Board of Health of the City of New York, he has no power outside of these limits. See, however, *Young v. Flower*, 23 N. Y. Supp. 232, where some kind of exigency jurisdiction is temporarily allowed.

³ *United States v. Eaton*, 144 U. S. 591; see *Stein v. Bienville Water Supply Co.*, 141 U. S. 67; *Charles River Bridge v. Warren Bridge*, 11 Pet. 496; *Ruggles v. Illinois*, 108 U. S. 527; *Yick Wo v. Hopkins*, 118 U. S. 356.

sustained in the cases cited and is especially mentioned in *Morgan v. Louisiana*, *Patterson v. Kentucky*, *Fertilizing Company v. Hyde*, *Polinsky v. The People*, *Train v. Boston Disinfecting Company*, *Barbier v. Connolly*, *Lockwood v. Bartlett* and other decisions, while the principle is maintained that they have only the powers expressly granted or those necessary to carry into effect the powers granted. The court very appropriately says in one of these cases¹ "sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, true that there must be lodged somewhere and in some person or body the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying, except to the ultimate tribunal of public judgment exercised either in the pressure of opinion or by means of the suffrage."

"The same principle has been more freely extended to the quasi-legislative acts of inferior municipal bodies, in respect to which it is an ancient jurisdiction of judicial tribunals, to pronounce upon the reasonableness and consequent validity of their by-laws. In respect to these, it was the doctrine that every by-law must be reasonable, not inconsistent with the charter of the corporation, nor any statute, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject, or the rights of private property. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied with an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

These personal rights of liberty and property suffer less from encroachment in the quarantine laws and practice of most recent estab-

¹ 118 U. S. 870, 878; Dill, on Mun. Corp. (8d ed.), § 819, and cases cited; *State v. Cincinnati G. L. & C. Co.*, 18 Ohio St. 262; *City of Baltimore v. Radecke*, 49 Md. 217; *Health Dept. v. Rector, etc., of Trinity Church*, N. Y. Com. Pl., 17 N. Y. Sapp. 510; 48 N. Y. St. R. 142. See the difference between implied powers to complete those expressly granted, and express powers as in *Polinsky v. People*, 73 N. Y. 65; *People v. Squire*, 107 N. Y. 598; 145 U. S. 175; *Powell v. Pennsylvania*, 114 Pa. St. 265; 127 U. S. 678; *Kidd v. Pearson*, 128 U. S. 1.

lishment, conditioned upon the enlightened views of sanitary science and experience, and the political wisdom of civilization in higher development than formerly, when quarantine was dreaded most and was least effective. The "evil eye and unequal hand" of either ignorance or prejudice may require interference, but generally the attempt is made to define and prescribe, as particularly as possible, the duties and powers of officers of quarantine, and the obligations resting upon masters, owners and consignees of transports, and the necessary restraints upon persons, baggage and merchandise entering quarantine. A common provision is, that vessels may return to sea without quarantine before breaking bulk, if the health officer is satisfied that its sick will be taken care of for the remainder of the voyage, and its bill of health shall be returned if it has not arrived at its port of destination. No vessel shall be put in quarantine, or depart therefrom without the written decision of the health officer, in which there shall be no delay. On the arrival of an infected vessel, all well persons on board shall have their freedom as soon as possible, consistently with the regulations established by law. All such persons shall be immediately transferred to the hospital set apart for their reception, and the vessel unladen, purified, and admitted to pratique as soon as possible. Merchandise, for the purpose of the sanitary measures adopted, is divided into classes,¹ subject to obligatory or optional quarantine, or exempt from quarantine, and cattle are included with merchandise usually in the class subject to quarantine at the option of the health officer. There is to be the necessary separation of persons sick with different diseases, and of merchandise from different vessels and places and at different times to quarantine. Warehouses, hospitals, wharves, docks, boats and appliances are furnished, and provision made for the enlargement of the necessary means to secure health and protection, purification and disinfection with as little disturbance as possible. Otherwise there is small room for discretionary action and none beyond the terms of the law. Clothes and dunnage, contaminated with infection, shall be disinfected or destroyed, and there is no com-

¹ N. Y. Laws 1892, chap. 486, §§ 22, 23, 26, 28, 34, 35, 36, 37, 40. Upon this question of compensation, see chap. I, also *Beer Co. v. Mass.*, 97 U. S. 25; *State v. Snow*, 8 R. I. 64; *Train v. Boston Disinfecting Co.*, 144 Mass. 528; *Diamond Match Co. v. New Haven*, 55 Conn. 510; *St. Louis v. Stern*, 8 Mo. App. 48; *Powell v. Pennsylvania*, 114 Pa. St. 265; *Green v. Swift*, 47 Cal. 48; *Green v. State*, 73 Cal. 29; *Moses v. Sandford*, 11 Lea, 781; *Blazier v. Miller*, 10 Hun, 485; *People v. Hawley*, 8 Mich. 330; *Scovill v. McMahon*, 62 Conn. 378.

pensation for it. Fees and expenses for the discharge of the duties prescribed by law, are to be collected, and are made liens on the vessel's merchandise and other property in relation to which they have been incurred. Masters of vessels must provide for the passengers on board of any vessel under quarantine. Complaints against orders may be made, and appeals to the commissioners of quarantine are to be heard and decided in thirty-six hours. Ample provisions are made for the enforcement of these laws and the punishment of offenses against them. Powers of arrest and detention are given and actions for penalties may be maintained, while there is a specification of the jurisdiction of officers and of courts, and adequate tribunals are secured to avoid unnecessary delays. The most recent codification of these laws for the State of New York has been followed in this resumé, but a reference to the cases already referred to, especially that in the United States Supreme Court, of *Morgan v. Louisiana*, in support of the quarantine at New Orleans, will show the general and almost universal character of requirements. Few cases involve directly the questions that may be raised under these laws. In the State of New York the owner of rags, disinfected and detained for charges, was allowed his action in tort, but as in a similar action in replevin in Massachusetts, the health officers were sustained.¹ The rule is almost constant that any discretion lawfully used by public officers, as well as the discretionary action of courts, will not be reviewed.²

The real issues will be as to the discretion imposed by the terms of the law and the question of its abuse, which may be brought before the courts in a variety of ways. The United States Supreme Court in *Chicago v. Milwaukee and St. Paul R. R. Co.* reversed a judgment of the Supreme Court of Minnesota, "with instructions for further proceedings not inconsistent with the opinion of this court," where, under a mandatory law requiring the adoption of a tariff of rates, the defendant's motion for a reference to take testimony as to the allegations in the application for a mandamus against it, and to ascertain whether the

¹ *Lockwood v. Bartlett*, 180 N. Y. 840; *Train v. Boston Dis. Co.*, 144 Mass. 523; *Patterson v. Kentucky*, 97 U. S. 501.

² *Kimmish v. Ball*, 129 U. S. 217; *Sands v. Manistee R. I. Co.*, 123 U. S. 298; *The People, ex rel. Demorest, v. Fairchild, Attorney-General*, 67 N. Y. 334; *Woerishofer v. N. R. C. Co.*, 99 N. Y. 398; *People v. Haupt et al., Assessors*, 104 N. Y. 377; *People v. Pond*, 92 N. Y. 648; *Mayor of Baltimore v. War*, 27 Atl. R. 85; *People v. Fire Assn. of Phila.*, 93 N. Y. 811; *id.*, 119 U. S. 110; *People v. McCarthy*, 103 N. Y. 680; *Freeman v. Cornwall*, 10 John. 470.

rates fixed were fair and just, had been denied.¹ The same court reviewed the jurisdictional questions raised in *Harris v. Barber* on a writ of *certiorari*, treating it as a writ of error, where the object was to bring up after judgment the proceedings of an inferior tribunal whose procedure was not according to common law. Certainly a well person detained in an infected ship has a right to be heard, and is not limited to his appeal to the quarantine commissioners.² In *Ex parte Siebold* the court held that "where personal liberty is concerned, the judgment of an inferior court affecting it is not so conclusive, but that the question of its authority to try and imprison the party may be reviewed, on *habeas corpus*, by a superior court or judge having power to award the writ. This was an effective remedy in *Ex parte Nielsen* in the same court.

In *People v. Liscomb* the Court of Appeals in New York said that the right to relief from unlawful imprisonment, through the instrumentality of the writ of *habeas corpus*, is not the creation of any statute, but exists as part of the common law of the State. Thus it will appear that in the law itself, we find the definition and limitation of the power of the officials, as well as the warrant for the protective measures they enforce, and there may be a transgression on either hand beyond the limits of authority, and an invasion thereby of personal rights, which would justify the interference of the courts to set it aside, or a disobedience, which may be punished in the manner and to the extent prescribed.³

Other quarantine than that on the seaboard is not infrequently insisted upon in cities, towns and in the interior. In the face of great and impending peril or pestilence, the ordinary civil authorities will

¹ *Chicago v. M. & St. P. R. R.*, 134 U. S. 418; *Harris v. Barber*, 129 U. S. 366; *Ex parte Nielsen*, 131 U. S. 176; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Coy*, 127 U. S. 731; see article in November, 1892, *N. Am. Rev.*, p. 636, *Sanitation v. Quarantine*.

² See *Laws of N. Y.* 1892, chap. 486, § 26. In *Calder v. Bull*, 3 Dallas, 386, Judge Chase says: "No man should be compelled to do what the laws do not require, nor refrain from acts that the laws permit." See *Austin v. Murray*, 16 Pick. 121; *Matter of Jacobs*, 98 N. Y. 109. In *Watertown v. Mayo*, 109 Mass. 315, Judge Colt says: "The law will not allow rights of property to be invaded under the guise of the police regulation for the preservation of health; and when it appears such is not the real object, courts will interfere to protect the rights of the citizen." Aliens may also have protection. 6 Sawy. 451; 118 U. S. 356; *Railway Co. v. State*, 49 Ohio, 189.

³ *People v. Liscomb*, 60 N. Y. 559; see *People v. Marx*, 99 N. Y. 377; *Huntley's case*, 156 Mass. 236; *Sennot's case*, 146 Mass. 489; *Wilkinson v. Rahrer*, 140 U. S. 545.

hold and examine railroad trains or river steamboats, and exclude infected persons and merchandise, as was observed throughout the United States and in Canada on the advent of cholera in 1892. This is but a recurrence to the old customs of towns, and the law of self-defense, and from both sources, that is to say, from common law or charter privileges, or from the inherent police power for absolutely necessary self-protection, such action, in an extraordinary exigency, may be defended. Ordinarily laws, by-laws and ordinances long settled, arrange the prudential separation and isolation most important in crowded communities subject to the ravages of contagious and infectious disease.

The State law in New York has enjoined duties, and delegated authority to the health officers in the cities, villages and towns of the State, as follows: "To meet in their respective cities, villages and towns, and fix and determine the period of quarantine to which vessels, vehicles or persons arriving in such city, village or town shall be subject; to make regulations concerning the place and mode of quarantine, the examination and purification of vessels, and of other craft not under quarantine; the treatment of vessels, articles or persons thereof; the regulation of intercourse with infected places; the apprehension, separation and treatment of emigrants and other persons who shall have been exposed to any infectious or contagious disease." They may regulate and prohibit, or prevent all communication or intercourse with all houses, tenements and places, and the persons occupying the same, in which there shall be any persons who shall have been exposed to any infectious or contagious disease; they shall provide suitable places for the reception of persons and things infected with malignant, contagious or infectious disease, and in all cases where such persons cannot otherwise be provided for, procure for them medical and other attendance and necessities.¹ They may issue warrants, and employ the necessary aid, and impose penalties, and nothing is lacking to accomplish the object of the law. Similar delegated powers, but specially conferred by the charters of several cities, have been by them carried into effect.

The ordinances, orders and regulations must, in all cases, be published, and in proceedings thereunder should be set out in the pleadings.²

¹ N. Y. Laws, 1881, chap. 431; 1880, chap. 324; 1870, chap. 291, § 8; N. Y. State Board of Health, Circular No. 25.

² *People v. Lynch*, 12 Hun, 65; *Schrumpf v. People*, 14 Hun, 10; *Cox v. People*, 7 Hun, 214.

A violation of the Sanitary Code in the city of New York¹ is a misdemeanor, and, in addition, there may be a prosecution for a penalty. Reports are required of contagious and infectious diseases, and of any person sick, within the knowledge or charge of masters, owners and consignees or consignors of vessels, and keepers, lessees, tenants or owners of hotels, boarding and lodging-houses, and from physicians, and also from the officers of the public institutions. The Code forbids the removal from vessels or houses of persons or things in a dangerous condition, and that many articles specified shall be brought into the city without the permit from the health department; and no article or person from any infected place, or from any building in which there has been, lately, any person sick of a contagious disease, may, without a like permit, enter the city; and no person sick in the city of such a disease shall be removed without the written permit of the health department.

The legislature delegated greater and further powers in this regard to the Board of Health in New York city, including the removal of any vessel from which it shall deem it probable that any contagious or infectious disease may be brought into the city, the removal to a proper place, designated by the board, of any person sick with any contagious, pestilential or infectious disease, and the exclusive charge of the hospital for the treatment of such cases. The Board of Health may send to such places, as it may direct, all aliens and persons, not residents of the city, sick of such diseases, and has every equipment and all authority in cases of emergency, and in case of extraordinary danger from pestilence, to carry out its orders and plans in pursuance of these laws. It may cause any avenue, street, alley or other passage to be fenced up or otherwise inclosed, if it shall consider the public safety requires it, and may adopt suitable measures to prevent all persons from going to any part of the city so inclosed; and it may forbid and prevent all communication with a house or family infected with such a disease, except by means of physicians, nurses or messengers to carry the necessary medicines and provisions. The Board of Health may issue its proclamation, declaring any place infected within the meaning of the health laws of the State, and, therefore, may regulate² the mutual intercourse between New York and such place, and direct the apprehension and removal of all persons who shall come into the city contrary to their

¹ *Polinsky v. People*, 78 N. Y. 65; Sanitary Code, §§ 131-150; N. Y. Cons. Act of 1892, §§ 575, 622.

² N. Y. City Cons., Act of 1892, chap. XII, §§ 541, 542, 547, 548, 549, 551, 553, 556, 558.

prohibition and regulation; and other quarantine regulations are allowed as of the original authority of the State.

The model sanitary regulations¹ to be adopted by local boards of health in cities, villages and towns, issued by the New York State Board of Health, contain almost equally stringent provisions for internal quarantine of both persons and animals affected with any infectious or contagious disease, and with similar provisions against the entry of, and directing the removal of persons and articles liable to propagate a dangerous disease. Such regulations have been generally² upheld by the courts.

Brooklyn and other cities in New York State have codes of ordinances, and health regulations similar to that of New York, and the Sanitary Code has been followed and most of its provisions adhered to by many cities of the Union. The general rule has been well stated by a recent writer, that an ordinance of a municipal corporation has the effect of a local law, and any one who disobeys it is guilty of an actionable wrong.³ Boston and many other large cities have had, like New York city, powers on various subjects directly delegated by the State,⁴ while in England similar powers have been placed in commissions,⁵ or for minor offenses against health laws relegated to local boards of health, and authorities specially named within districts, and divisions smaller than towns.

The Revised Statutes⁶ of Michigan, as early as 1846, made the neces-

¹ Model Sanitary Regulations, Circular No. 26, N. Y. State Board of Health.

² *Village of Carthage v. Frederick*, 122 N. Y. 268; *Cronin v. People*, 20 Hun, 187; *Blazier v. Miller*, 10 Hun, 435.

³ *Elliot R. S.* 625; see *Nightingale's case*, 11 Pick. 168; *Polinsky's case*, 73 N. Y. 65; *St. Louis v. Stern*, 3 Mo. App. 48; *Com. v. Patten*, 151 Mass. 586; *Ho Ah Kow v. Nunan*, 8 Pac. L. J. 418; 5 Sawyer, 552.

⁴ The Mass. State Board of Health was established in 1869, and its annual reports are very valuable as showing the course of legislation, as well as the progress in sanitary science. See, also, Reports of the State Boards of Health of California, Louisiana, Michigan, Minnesota, New York and Connecticut.

⁵ See Eng. Pub. Health Act of 1848, and amendments, 1851, 1852; Pub. Health Act, 1872, 1875; Diseases Prevention Act, 1855, and Diseases Prevention Act, Metropolis, 1883, 1885, and amendment, 1891. Under this act was organized the Metropolitan Asylums Board as a local authority. There are thirty-nine local sanitary boards in London, and out-port authorities, the Thames Conservancy Board, and what some recent English writers have called an apparent confusion of authority. See article on "Cholera and our Protection," Dr. E. Hart, *Nineteenth Century*, October, 1892, p. 682.

⁶ See laws of Michigan relating to the public health, compiled and published by the Secretary of State, 1876, chap. 85; R. S. Mich., §§ 1692, 1699, 1706, 1708, 1710, 1718, 1715, 1718, 1720, 1725, 1727, 1734, 1735, 1736, 1737, 6877.

sary provisions for township boards of health, with full powers, and these laws, as amended and revised, are similar, in many elaborate details, to those we may find upon the seaboard, including precautions against contagion involving the examination of travelers by land as well as on the water, and restraints upon persons coming from infected districts. License to travel may, in such cases, be refused or granted by the board of health of any township to which such persons may come; and to travel within the State without such license after such persons have been cautioned, except by the most direct way to the State whence they came, subjects the offenders to a fine as well as the necessary restraint. Townships are authorized to establish quarantine ground and boards of health in each township bordering on Lakes Michigan, Superior, Huron, St. Clair and Erie, and on the principal rivers, straits and navigable waters connected with them, and make such quarantine regulations as they shall judge necessary for the health and safety of the inhabitants; and the expenses incurred on account of any person, vessel or goods under any such quarantine regulations, are to be paid by such persons, or the owner of the vessel or goods affected. Hospitals for contagious diseases are put under the control of the boards of health, and provisions are made for vaccination, and the care and removal of the sick, and for reports of all contagious diseases from physicians and others; for the necessary process and authority to enforce these regulations, and for remedies, both in equity and in law, for violations of health orders and regulations, comprising, also, those against nuisances and offensive trades.

A citation¹ from this statute law of Michigan presents the scope and extension of health authority, embodying the common features of this legislation wherever we find it, as follows: "The Board of Health shall examine into all nuisances, sources of filth and causes of sickness that may, in their discretion, be injurious to the health of the inhabitants within their township, or in any vessel within any harbor or port of such township, and the same shall destroy, remove or prevent as the case may require." Nearly the same phraseology is found in the New York laws organizing the City Board of Health and the State Board of Health. This common consent would give new force, if such were needed, to the health regulations adopted in any community, but they are all founded on the familiar principle, stated by the United

¹ R. S. Michigan, § 1699; N. Y. L. 1866, chap. 74, § 16; N. Y. L. 1880, chap. 322, §§ 6, 10.

States Supreme Court as to rights and by the New York Court of Appeals as to property, that all are held subject to the general police power of the State, to be regulated and controlled to secure the general safety and public welfare.¹ It were useless, therefore, to recapitulate every ordinance and every decision sustaining it.

No better example of successful administration can be presented than that from 1866 to 1892, under the ordinances of the Sanitary Code and the Health Law of New York city. These relate to medicines and adulterations and poison, to the ventilation and drainage of buildings and the care and keeping of tenements, lodging-houses and factories; to food and drink, that they may be found wholesome and safe for human food; that dangerous animals be not allowed to go at large in the streets; that slaughtering, slaughter-houses and markets be particularly regulated; that offensive odors, gases and liquids be not allowed to escape or become a nuisance; and all kinds of offensive trades specified be within control regulated and rendered innocuous; that filth and dirt be removed and not be permitted to accumulate anywhere; that privy vaults and cess-pools be under constant inspection, and preventive measures be taken against all nuisance; that diseased animals and sick persons should be within its exclusive jurisdiction and particular care, and all buildings be open to its examination; that it have the necessary reports and information, and its permit be necessary for every act and change and removal mentioned in the ordinances; that interment and the care of dead bodies be subject to its rules, and coroners' inquests be reported and the facts of vital statistics be furnished; that it have supervision over the conditions of health in railroad cars and carriages in the city, and be authorized to take the necessary measures to prevent accident and injury to life and health.

The Board of Health has general powers and discretionary authority, especially in times of peril from pestilence, and may both add to and amend the Sanitary Code.² By resolution and by a special procedure it can abate nuisances or provide remedies for them, as in the wisdom and discretion of the Board of Health shall be deemed meet and proper.

¹ *Beer Co. v. Mass.*, 97 U. S. 25; *Bertholf v. O'Reilly*, 74 N. Y. 509.

² See Sanitary Code, edition of 1892; N. Y. Laws 1866, chap. 74; 1867, chap. 956, 1874, chap. 635, 636; 1867, chap. 908; 1881, chap. 450; N. Y. City Cons. Act of 1882, as amended, §§ 533-667.

The two hundred and nineteen ordinances of the Sanitary Code are a compendium of almost all the necessary local regulations for the care and protection of health in a municipality, while the health statutes of New York State have created a self-contained and almost entirely independent health tribunal of extraordinary effectiveness, of large and extending jurisdiction, fortified by long and wide experience, and the decisions of the courts of the State in its favor for twenty-five years.¹

The difficulty of a strict construction of the terms of a law conferring discretionary powers upon a public officer is greater in matters of the protection of life and health expressly placed under an exclusive jurisdiction. Assuming the *dictum* that the health officers possess only the powers granted in express words, those necessarily or fairly inferred, or incident to the express grant, and those essential and indispensable to the declared object, intent and purpose of the law,² we are met by the further rule that "any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public," and here it is that we are informed that every preventive, care and regulation is both for the purpose of the law and in favor of the public. In the case of the *Church of the Holy Trinity v. United States*,³ the opinion of the highest court, citing the famous case of *Vidal v. Girard*, wherein the clause of Mr. Girard's will, that no minister of the gospel should be permitted to enter the college founded by him, was construed and reconciled with the finding that the Christian religion was a part of the common law of Pennsylvania, and that the clause was not proscriptive of its being taught, ruled according to the intent and the title of the act, rather than by its express terms, and said that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intentions of its makers."

A wider door is opened to judicial than to official construction, as may be seen in the case, in the same court, of *Morrill v. Jones*, in 1882, and the *United States v. Eaton*, in 1892, wherein the court says of both the Secretary of the Treasury and a Collector of Internal Revenue, that neither can prescribe a regulation not within the express grant and

¹ *Heister v. Met. Board of Health*, 87 N. Y. 661; *Cox v. Justices*, 7 Hun, 214; *Polinsky v. People*, 78 N. Y. 65; *Health Dept. v. O'Reilly*, 49 N. Y. Superior Court R. 524; *Health Dept. v. Lalor*, 88 Hun, 542; and see *Wilkinson v. Rahrer*, 140 U. S. 545; *Barbier v. Connolly*, 118 U. S. 81.

² *Dill. on Mun. Corp.* 1, § 89; *Minturn v. Larue*, 28 How. 436, opinion by Nelson, J.

³ *Church of Holy Trinity v. U. S.*, 148 U. S. 457; *Vidal v. Girard*, 2 How. 198, 200.

terms of the law, the effect of which would be to alter or enlarge the law. All they can do is to regulate the mode of procedure to carry into effect what Congress has enacted." The New York Court of Appeals held a like doctrine respecting the powers conferred upon the Board of Health "to provide for the proper drainage of lands in the city of New York." As the Supreme Court has not infrequently said, judicial cognizance will be taken of matters of history and matters of science; and "of whatever is known within the limits of the jurisdiction of, and involved in the case presented, so that unreasonable regulations may be declared inoperative and void."

Animals are included within the operation of these laws, and not merely food, but all domestic animals. The same reasons prevail as with respect to other things, but, in addition, motives of humanity induce legislation to prevent cruelty, and to secure their proper treatment. Some of their diseases are, in themselves, dangerous to man. Hydrophobia and glanders affecting personal safety, Texas fever and pleuro-pneumonia rendering meat unwholesome, certain diseases in swine and sheep, and tuberculosis affecting milch cows and their product. City ordinances and health regulations usually cover these subjects, and drastic preventive measures are taken in the exercise of police power to avoid some of these dangers on the one hand, and to prevent and punish offenses on the other. The Penal Code makes certain infractions of such laws, as any violation of the Sanitary Code is, a misdemeanor. Dangerous animals may be removed and killed, and taken to the offal dock. They are subject to the common-law right, as well as the police regulations of the government, for the destruction of property in a case of immediate necessity, or of a noxious public nuisance.¹

This principle, says the court in *Railroad Company v. Husen*, "justi-

¹ *Morrill v. Jones*, 106 U. S. 466; *U. S. v. Eaton*, 144 U. S. 677; *Matter of Van Buren*, 79 N. Y. 384; see *Sparrow v. Strong*, 3 Wall. 104; *Brown v. Piper*, 91 U. S. 42; *Yick Wo v. Hopkins*, 119 U. S. 371, 373, and, also, *Ah Kow v. Nunan*, 5 Sawy. 552; Civil Rights cases, 109 U. S. 24, 25; *Viterbo v. Friedlander*, 120 U. S. 708; N. Y. L., chap. 286 of 1888.

² See chap. 560, N. Y. L. 1886, an act for the preservation of the health of animals for human food; ordinances for muzzling, licensing and killing dogs; also, board of health regulations respecting animals sick with any dangerous or contagious disease, and animals sick with glanders or farcy; Sanitary Code of N. Y., §§ 49, 54, 202, 120, 121, 122, 126; Laws relative to cruelty to animals, and N. Y. Penal Code, title 16, Cruelty to Animals, §§ 655-669; 2 Kent Com. 329; *Russell v. Mayor*, 2 Denio, 461; 95 U. S. 471.

fies the exclusion of property dangerous to the property of citizens of the State; for example, animals having some contagious or infectious disease, and such a use of property as is injurious to the property of others." Chief Justice Shaw has said¹ that "it is a well-settled principle growing out of the nature of well-ordered society, that every holder of property holds it, under the implied liability, that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. This power cannot be burdened, says the court in *Mugler v. Kansas*, with the condition that the State must compensate the individual by reason of their not being permitted a noxious use of their property." The legislature may pass many laws, the effect of which may be to impair, or even destroy the rights of property. "Private interests must yield to the public advantage" is held in *Phelps v. Racey*. In *Goodrich v. People*, the defendant was held liable for the sale of a cow with a sore in her head, although no injurious consequences were proven. Like results have followed in the English courts. It must be remembered, says Chief Justice Taney in the License cases, that disease, pestilence and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented as far as human foresight or human care can guard against them."

In the Passenger cases quoted in the dissenting opinion in *Bowman v. Chicago and Northwestern Railroad Company*, it was said that "a bale of goods upon which the duties have or have not been paid, laden with infection, may be seized under health laws, and if it cannot be purged of its poison, may be committed to the flames." Equally forcible is the example from a noxious, diseased, and dangerous animal, fatally stricken with a highly contagious disease, unfit for any safe human use. Its owner, whether the possessor of other animals likely to be infected or not, yet, merely as one of the community, is interested in its removal, for which he has no claim to remuneration, unless by the terms of some special statute it be given rather as a

¹ 7 Cush. 58, cited in *Patterson v. Kentucky*, 97 U. S. 505; *Mugler v. Kansas*, 128 U. S. 628.

² *Phelps v. Racey*, 60 N. Y. 14; see *Lawton v. Steele*, 119 N. Y. 227; *Blazier v. Miller*, 10 Hun, 485; *Goodrich v. People*, 3 Park. Cr. 622; *Rex v. White*, 1 Burr. 337; *Rex v. Dixon*, 8 Maule & Selwyn, 11; and see *Banbury v. Page*, 45 L. T. R. N. S. 759; 5 How. 597; *Bowman v. C. & N. W. R. R.*, 125 U. S. 468.

public contribution for his individual loss than as compensation, and therefore fixed within some arbitrary limit. It was with this view that in the acts of New York State to prevent the introduction and spread of the disease known as the rinderpest, the commissioners appointed to inspect, to quarantine, and, if necessary, to slaughter animals affected with the disease mentioned, were directed to appraise the animals slaughtered, and one-half the value was to be paid to the owner by the State. In New York, in 1868, there was a general inspection, quarantine and also destruction of animals sick with Texas fever or rinderpest; and in the preventive measures employed, the Governors of four States, Indiana, New Jersey, New York and Pennsylvania, took the appropriate action under the laws of these several States.¹

The Royal Commission for investigating rinderpest in England, in 1865 and 1866, was constituted by Parliament. In 1872, the Board of Health in New York city, and the public authorities in many States and countries had to meet the epizootic among horses, a fatal and infectious or contagious disease, for which quarantine was found beneficial, and direct authority was used by the sanitary officers in the removal, destruction, and burial of diseased horses. In this matter the principal action of the Board of Health was under the Sanitary Code, and by resolution under its general powers conferred by law. Congress, in 1884, by act of May 29 of that year, established The Bureau of Animal Industry to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals. The Commissioner of Agriculture was thereby authorized to make special investigations, and the Secretary of the Treasury was instructed to adopt measures not inconsistent with the provisions of the act to prevent the exportation of diseased live-stock. Railroads and masters of vessels were forbidden, under penalty of the law, to receive for transportation, or to deliver "any live-stock affected with any contagious disease." The several United States District Attorneys were directed to prosecute all violations of the act.²

By the act of August 30, 1890, provision was made for the inspection of meats for exportation, and the prohibition of the importation

¹ Chap. 740, 1866; chap. 453, 1867; see Report of Met. Board of Health of 1868, pp. 186, 194, 209; Bd. of H. Report, 1873, p. 26, *et. seq.*

² 23 Stat. 31; Supp. R. S. 435; see R. S. 520, 529; chap. 122, 1889, Supp. U. S. R. S. 679; 26 Stat. 414; Supp. R. S. 794; see act Oct. 1, 1890, chap. 1244, §§ 20-21; Supp. R. S. 861.

of adulterated articles of food and drink. It authorizes the President to make proclamations in certain cases, suspending the importation of dangerous articles of food and drink, and also of all animals, for such time as the public good may require. This act prohibited the "importation of meat, cattle, sheep, and other ruminants, and swine, which are diseased, or shall have been exposed to such infection within sixty days, making a violation of this provision a misdemeanor, punishable with a fine not exceeding \$5,000, or imprisonment for a term not exceeding three years, and forfeiting the vessel in which there was such unlawful importation to the United States.

All importations of the animals described in the act were to be at certain quarantine ports, designated by the Secretary of Agriculture, with the approval of the Secretary of the Treasury. The Secretary of Agriculture may cause to be slaughtered all infected animals, and animals exposed to infection, and the "value of animals slaughtered as being exposed to infection, but not infected, shall be ascertained by the Secretary of Agriculture, and paid to the owners out of money in the treasury appropriated for the use of the Bureau of Animal Industry."

In the States of Massachusetts and New York, in 1892,¹ were passed laws relative to tuberculosis in milch cows and other cattle, and infections and contagious diseases of cattle; and provision is made for the destruction of animals affected with tuberculosis, or any contagious or infectious disease; or liable to contract and communicate such disease; and for the proper disposition of their hides and carcasses, and of all objects which might convey infection or contagion. The actual value of animals slaughtered under the provisions of these laws may be paid to the owner, but in New York the enforcement of the law is reposed in the State Board of Health, which must first have the animals examined by medical or veterinary practitioners in its employ, and may by resolution provide for the payment. The Board of Claims is to hear, audit and determine all claims under the act; but no compensation is to be given to any one who has willfully concealed the existence of disease among his animals, or who has contributed by act or willful neglect to the spread of the disease; and any person refusing to obey, or transgressing the lawful orders, rules and regulations of said Board of Health, is declared guilty of a misdemeanor, and also liable to pay a civil penalty at the suit of the said board.

How narrow the line of division is between cases may be seen in

¹ Mass. Pub. Stat. 1892, chap. 195; N. Y. L. 1892, chap. 487.

Railroad Company v. Husen, in 1877, and *Kimmish v. Ball*, in 1889, when the subjects of these actions were nearly the same, concerning the prohibition of Texan cattle which have not wintered north, and holding owners of transportation or owners of cattle liable for damage from such cattle spreading disease; but in the first case the court says, "it is noticeable that the statute interposes a direct prohibition against the introduction into the State of all Texan, Mexican or Indian cattle, during eight months in the year, without any distinction between such as may be diseased and such as are not;" and holds that such a statute is more than a quarantine regulation, and is not a legitimate exercise of the police power of the State.¹

In the latter case, the court urges this discrimination, and does not find in the Iowa statute the same difficulty, but says, "the case is therefore, reduced to this, whether the State may not provide, that whoever permits diseased cattle, in his possession, to run at large within its limits, shall be liable for any damages caused by the spread of the disease occasioned thereby, and upon that we do not entertain the slightest doubt." In *Brimmer v. Rebman*, and *Minnesota v. Barber*, State laws were held by the United States Supreme Court to be burdens upon interstate commerce, unconstitutional and void, because the inspections required were not confined to diseased animals and to unwholesome meats, but "touched all alike, however free from disease;" thus extending police restraints to merchantable articles, subject only to regulation by Congress.

In Massachusetts, under an act of 1887 authorizing the summary killing of animals having the farcy or glanders, without compensation to their owners, the court held that an adjudication of the Cattle Commissioners, that an animal has the disease, is not conclusive; and an order issued by them for killing an animal not, in fact, infected, in an action by the owner for compensation, is no defense to those executing the order.²

At the General Sessions Court of New York city, November 28, 1887, the case of *People v. Carson* was tried on an indictment "for keeping and retaining a horse having the glanders," and on conviction the attention of the court was drawn by the District Attorney to the well-recognized character to the disease, the numerous recorded

¹ 95 U. S. 465, 469; 129 U. S. 217; 138 U. S. 78; 136 U. S. 313.

² *Miller v. Horton*, 152 Mass. 540; see *Sawyer v. State Bd. of H.*, 125 Mass. 182; *Phila. v. Scott*, 8 Pa. 80, 87; *Belcher v. Farrar*, 8 Allen, 325; *Mitchell v. Harmony*, 13 How. 115.

cases of its communication to human beings, the strict supervision exercised in London, and the immediate destruction of glandered horses required when discovered.¹ The defendant, a horse dealer, was sentenced to six months' imprisonment. Several convictions have been had in the city of New York for the offense of sprinkling salt in the streets to melt the snow, and thereby occasioning injury and suffering to animals. The Supreme Court at General Term in New York City in May, 1888, filed a decision overruling a demurrer to an indictment for this offense in *People v. Sheridan*, thus sustaining the local law.

It has happened that danger to the public health and public nuisances requiring sanitary measures for their abatement, have come from public property and public works under the authority and in the charge of city or village officers, who are unwilling or unable to take the requisite action. Such difficulties are more easily arranged under the national acts in England,² especially the Public Health Acts, and naturally fall within the jurisdiction of the local government board or the boards and commissions specially appointed for the metropolis. In some of the States of the American Union, and particularly Massachusetts and Michigan, a somewhat similar authority is exercised by the State Boards of Health.

In New York State such intervention is more limited, but in 1884 the question was resolved by the Attorney-General respecting a brick sewer in the streets of Castleton, which, in one place, had been left uncovered for over one hundred feet, and had been declared by the local board a nuisance and ordered to be covered. This the village authorities declined and refused to do. The Attorney-General finds, under the fourth section of the act for the preservation of the public health, that "in any case of non-compliance with such an order as that served upon the village authorities in the present case, the Board of Health may enter upon the premises and remove the nuisance, and the expense shall be a charge upon the occupant of the premises, and may be sued for and recovered by the Board of Health in its own name."

¹ See record of this case published by Am. Soc. Prev. Cruelty to Animals, 1877.

² See English case, cited Mass. State B. H. R. 1876, p. 296; *The Attorney-General v. Darlington*, where the vice-chancellor sustained an action for an injunction to prevent the city authorities from polluting air and water by their sewage. *Schriver v. Village of Johnston*, 54 N. Y. St. R. 578; *City of Jacksonville v. Doan*, 155 Ill. 23; *Kellogg v. City of New Britain*, 62 Conn. 232; *Constitution Wharf v. Boston*, 156 Mass. 397; *Hill v. Mayor*, 139 N. Y. 495.

³ Opinion of D. O'Brien, Attorney-General, September 11, 1884; *Fifth Annual Report of N. Y. State Board of Health*, pp. 65, 67.

He holds that by the construction and maintenance of this sewer in the public highway, the village of Castleton became an occupant *pro tanto* of the premises upon which the nuisance is located within the meaning of the statute; that "by reason of the failure and refusal of the village authorities to comply with the order served upon them, the local board has power to incur the necessary expense for properly covering this sewer; that it is their duty so to do; that the expense incurred in such work will be a charge upon the village of Castleton, and that an action will lie, in the name of the Board of Health, for the recovery of the same against said village as a corporation. Under the existing statutes the amount of any judgment recovered in such an action must be assessed, levied and collected by the board of trustees of Castleton at the same time, and in like manner, as other moneys for the necessary expenses of the village, in addition to the moneys now authorized to be assessed, levied and collected for that purpose;" and further, that "local boards of health have authority, within the meaning of the act for the preservation of the public health, to employ legal counsel whenever necessary, and they should do so in cases like the present." Whatever doubt may arise as to the proper form of the action, or whether one part of city or village government could, in such case, sue the corporation, because of the default of another part, it would seem, from analogy and from other precedents, that in the local Board of Health rested both the duty and power to incur the expense, do the work and abate the nuisance, and that the corporation must meet its cost.

On July 18, 1873, the Board of Health of the city of New York adopted the following resolution, and subsequently on July 23, and July 24, by its own officers, and by workmen and means employed and used by them, performed the work required respecting the booths, stalls and stands around Washington Market and the neighboring streets of the city of New York, as follows:

"Whereas, due notice has already been given to the owners of the said booths, stalls and stands; and whereas, the Department of Public Works has not been enabled to obey the previous order of this board to remove the said booths, stalls and stands; and whereas, the plans of the superintendent of the public markets have been considered, and, in the opinion of this board, will not remedy the evil, nor improve the position of the owners and occupants of said booths, stalls and stands; and, whereas, any delay in the removal thereof is declared by this board dangerous to life and detrimental to the public health; therefore, Resolved, That the Board of Police be requested and directed

to remove, and on or before the 21st day of July, 1873, to cause the removal of booths, stalls and stands around Washington Market, viz.: On the northerly side of said market, from Washington street to West street; on the westerly side thereof, from Vesey street to Fulton street; on the southerly side thereof, from Washington street to West; and also on the easterly side thereof, near the corner of Vesey street; and to clean the sidewalks, street pavements and gutters in the neighboring streets above the said market." The material was removed by trucks to the corporation yard, leaving the streets unobstructed July 24, as is shown by the reports filed. A similar course was pursued in respect to Fulton and other markets immediately thereafter.¹ Injunctions were sought and hearings had in various legal proceedings in the Supreme Court of the State in New York City, but the action of the Health Department was not impeded, but was sustained by the courts.

Another exigency has been met. Foul and pestilential odors have come from one neighborhood to another, or sewers or works in one locality have caused a nuisance in another, under a different administration. The State Boards of Health in several States, have instituted proceedings in such cases, to remedy these evils and have brought relief.

In New York the City Board of Health, in 1878, procured the indictment of offensive works in Queens county on Newtown creek, under the so-called Three Counties Act,² which allows an indictment in either of the counties, New York, Queens or Westchester, of a nuisance originating in one county and suffered in another.

A conviction was had in a test case in the General Sessions Court, and four factories were removed. Probably, outside of this act, the prosecution could have been maintained against the authors of the nuisance caused in the streets and ways of New York. In 1887 the Court of Appeals of New York sustained an order of the Board of Health of the town of Brighton,³ declaring that the discharge of sewage from the city of Rochester, near the boundary line between the city and the town, was a nuisance dangerous to the public health, and directing it to be suppressed, and held that, "while the Board of Health of a town may not summarily execute its orders as to the abatement of a nuisance, by going outside of the boundaries of the town for that purpose, it may invoke the aid of the court to restrain a violation of its

¹ See Report of Board of Health, New York, 1878, pp. 12, 13, 73, 75, 410.

² N. Y. Laws 1851, chap. 415.

³ Gould v. Rochester, 105 N. Y. 46.

orders, and to enforce the abatement of the nuisance, although the cause arises in an adjoining municipality." The city of Rochester had, under legislative authority, acquired land in the adjoining town, and opened ditches thereon to carry off the drainage of the city. It dug the ditches and constructed sewers which discharged into the ditches near the boundary line, and the sewage was thus carried upon and over the town lands into a creek, creating the nuisance. The plaintiffs, constituting the Board of Health of Brighton, having made the order referred to, and caused it to be served upon the proper city authorities of Rochester, on the continuance of the nuisance and violation of the order, began this suit, in which they had judgment.

Consistent with the preventive measures of quarantine, and the safeguards used against the entrance and ravages of infectious and contagious diseases is the requirement of vaccination. Compulsory vaccination has been instituted in several countries, and by the laws of several States, in respect to minors. City ordinances regulate it, but the indirect methods of excluding children not vaccinated from schools and factories, or, in case of immigrants, insisting upon quarantine, and the offer of free vaccination with the constant supervision of the health officers are more effective. In England there has been the national vaccine establishment, and in 1867 penalties were prescribed for every parent or person having the custody of a child born in England who did not, within three months after the birth of such child, cause it to be taken to the public vaccinator of the vaccination district in which it was resident, for vaccination.¹ In Massachusetts parents and guardians must cause children to be vaccinated before they are two years old, and for every year's neglect are to be fined five dollars; and town authorities may require and enforce vaccination of all inhabitants wherever the public health shall require it, and are required to furnish the means of vaccination. Persons not sufficiently protected from small-pox shall be vaccinated in quarantine, or be detained there until

¹ 80 and 81 Vict., chap. 84; see 8 and 4 Vict., chap. 29, an act to extend the practice of vaccination, July 23, 1840; 1 Russ. Cr. 108. In 2 Chitty Cr. L. 656, there is an indictment mentioned against an apothecary for keeping a common inoculating-house near the church in a town. *Rex v. Vantandillo*, 4 M. & S. 72; Mass. Pub. S., Preservation of Public Health, chap. 80, p. 443, §§ 54, 55; Revision of 1882, pp. 443, 560, 563. "Vaccination and security of life." N. Y. Laws, chap. 358, 1863, § 10; chap. 496, 1892, § 16; chap. 498, 1860; chap. 635, 1874; N. Y. San. Code, §§ 149, 150; see R. S. Mich., chap. 35, § 45. France, Austria, the German States, and Sweden have obligatory laws with frequent inspections, and in some places a vaccinator's certificate is necessary to the public allowance of any charity or aid.

they have passed the incubative period from the last-possible exposure. The Sanitary Code of New York City is compulsory in form, but has been administered without coercion, save in extraordinary cases when contingent upon the isolation or quarantine or removal of persons in a tenement or lodging-house, where there has been great exposure and insufficient protection. The legislature of New York in 1860 enacted that the trustees and boards of common schools might exclude from the benefits of the common schools any child or person who has not been vaccinated, and until such time as they shall be vaccinated. In 1874 it passed "An act to secure effective vaccination in the city of New York and the collection of pure vaccine virus," providing for the organization of a corps of vaccinators, and the collection and preservation of pure vaccine lymph or virus for the thorough and systematic vaccination of all unvaccinated persons residing in the city of New York.

Litigation has followed these laws, principally, however, because of alleged ill-treatment or negligence in exposure by officials or persons under treatment or in vaccination, less because of any claim that vaccination was improper or illegal. Something has depended upon the choice or use of virus or lymph, because of the scientific questions involved in the increasing preference for bovine over humanized virus. It was this question in connection with others before the New York Superior Court in the case of *Hickey v. The Cunard Steamship Company*, in May, 1890, and in a similar case against the same company in Boston. It was charged that the plaintiff was improperly vaccinated with humanized virus, and in a careless manner, so that ulceration and fever followed of such a serious character as to destroy her health for a considerable time, but the plaintiff failed of a verdict and these cases were not pursued. A similar result was reached in the same court in *Hallowell v. The Board of Health of the City of New York* on like allegations in 1875. In *Brown v. Purdy*¹ the action was against the physicians who had diagnosed the plaintiff's case as small-pox and reported it to the Health Department, whereupon plaintiff was removed to the small-pox hospital and there discovered to be sick with measles and not with small-pox. The court on appeal held that the omission of patient's attending physician to use ordinary skill in diagnosing the disease before reporting it to the Board of Health as a case of small-pox, and the action of the Board of Health Inspector in caus-

¹ *Brown v. Purdy*, 54 Superior Ct. R. 109.

ing, under the laws governing his action in a case of small pox, her removal gave no right of action.

In *Tormey v. Mayor* the plaintiff in May, 1871, was, as she alleged, sick at her residence in New York of measles and was forcibly removed to the small-pox hospital. Negligence and "grave wrongs were charged against public agents and officials." Suit was brought against the city and came before the court on a demurrer to the complaint, which was overruled, with privilege to the defendant to answer over. The Health Department was afterward joined as a defendant, and upon a trial the plaintiff was unsuccessful. In *Laubheim v. De Koninglyke N. S. M.*, it was held that in the absence of evidence of any carelessness or negligence on the part of a steamship company, in its selection of a surgeon for one of its steamships, it was not liable for the negligence of the surgeon.

In *Allan v. S. S. Co.* it was said that a "person is not legally responsible for any unintentional consequential injury resulting from a lawful act, when the failure to exercise due and proper care cannot be imputed to him, and the burden of proving such lack of care when the act is lawful is upon the plaintiff," and that it was not necessary to discuss the duty of the defendant at common law, but the duty was assumed under the statute known and cited as the Passenger Act. The court says, when the ship-owner has employed a competent physician, and has placed in his charge a supply of medicines sufficient in quantity and quality, we think it has performed its duty to its passengers, and from that time the responsible person is the physician. "The work which the physician does, after the vessel starts on the voyage, is his and not the ship-owner's."¹

The presumption that under the law and ordinances cited the vaccination was a lawful act, would appear conclusive from these cases, and the only questions which would remain are those of negligence and willful wrongs such as were alleged, but not proven, in the *Tormey*, *Hickey* and *Laubheim* cases above mentioned. It was said in 1874, in the reports to the Registrar-General of the operations of the Scottish Vaccination Act, that "in Scotland there is but little of that unreasonable opposition to the practice of vaccination by which some opinionative men are elsewhere moved," and our courts have of late years been as little troubled with it.

¹ *Tormey v. Mayor*, 12 Hun, 542; 107 N. Y. 228; *O'Brien v. Cunard S. S. Co.*, 28 N. E. R. 266; 182 N. Y. 91-99.

A municipal corporation is not liable for neglect of attendants in a public hospital, nor where damages are claimed because of infection from a pest-house. The duties imposed by statute upon officials in caring for the public health are to be performed according to their discretion, and when this is fairly exercised, no liability to damages arises from misfortunes consequent upon their errors.¹

¹ *Richmond v. Long*, 17 Gratt. 375; *Brown v. Inhabitants of Vinalhaven*, 65 Me. 402; *Cain v. City of Syracuse*, 95 N. Y. 83; *Freeman v. Cornwall*, 10 Johns. 470; but where there is a failure in duty, see *Bassett v. Fish*, 75 N. Y. 303; *People, ex rel. Loomis, v. Board of Town Auditors*, 75 N. Y. 816; *Tormey v. Mayor*, 12 Hun, 542; see *Cavanagh v. Durgin*, 156 Mass. 466; *Gordon v. Becker*, 54 N. Y. St. R. 731; *Culver v. City of Streator*, 130 Ill. 288; 22 N. E. R. 810; *Fisher v. Boston*, 104 Mass. 89; *Caldwell v. City of Boone*, 51 Iowa, 687; *Elliott v. Philadelphia*, 75 Pa. St. 347; *Little v. City of Madison*, 49 Wis. 605; *Kansas City v. Lemen*, 8th Cir. Ct. App., Sept. 18, 1893, 57 Fed. R. 905. The argument and the reasoning of the court in this case, respecting the nuisance of a circus on ground set apart for a graveyard, that "the act of the municipality was an exercise of a power vested in it to promote the public welfare," reminds one of the statute of Winchester, A. D. 1285, § 6, excluding fairs and markets from such inclosures. *Statutes of the Realm* I, 96-98; select charters, Stubbs' 7th ed. s. v. Statute of Winchester, § 6.

CHAPTER VII.

PROTECTION OF PURITY IN WATER, IN FOOD, AND AGAINST DANGER FROM INFLAMMABLE OILS, AND EXPLOSIVE SUBSTANCES.

These special subjects of police powers are often provided for by statutes directing the same authority to frame and to supervise the enforcement of the regulations for the public welfare. In New York State, the State Board of Health is charged with this duty. City and village ordinances usually cover them. It does not follow because the legislature may have increased the offenses in each class, given additional safeguards, and added penalties, that the common-law remedies, where applicable, are suspended, and, in many instances, both civil and criminal prosecutions have been preserved, as under the health laws. Where a new offense is created and a penalty is given for it, or a new right is given, and specific relief given for the violation of such right, the punishment or remedy is confined to that given by statute; but giving a superadded penalty for the erection or continuance of a nuisance, does not prevent the common-law right of the public to have it indicted and removed; nor does it prevent it being abated in the usual way by individuals at the peril of showing that it was a nuisance, and that they did no unnecessary injury in removing it.”¹

In *Regina v. Cotton*, the court, referring to a special procedure under the Nuisance Removal Act, remarks that: “It would be most dangerous to take away from the regular tribunals the investigation of such a question, often a most complicated and important one, and to

¹ *Renwick v. Morris*, 7 Hill, 576; *Stafford v. Ingersoll*, 3 Hill, 41; 2 Story Eq. Jur., §§ 921-927; *People v. Sturtevant*, 9 N. Y. 269; 105 N. Y. 49. “It is an indictable offense to carry the refuse of gas into a great public river, and thereby render the waters corrupt, insalubrious and unfit for the use of man; and the managers and directors of a gas company are responsible for the acts done by their superintendent and engineer under a general authority to manage the works.” *Rex v. Medley Co.*, 6 C. & P. 292; 1 Russ. Cr. 110; *State v. Frieberg*, 49 Ohio St. 585; *Kellogg v. City of New Britain*, 62 Conn. 232; *Columbus & H. C. I. Co. v. Tucker*, 48 Ohio St. 42; *Indianapolis Water Co. v. American S. B. Co.*, 53 Fed. R. 970; *Schrivver v. Village of Johnston*, 54 N. Y. St. R. 573.

transfer it to the jurisdiction of any two justices of the peace." The case of *People v. Sands* was decided upon the form of the indictment, and is not an authority upon the question of nuisance in keeping a large quantity of gunpowder in a certain house, near the dwelling-houses of divers good citizens, and near a public street, is the comment of the court in *Heeg v. Licht*, a later case, and Mr. Justice Thompson adds: "The English statute, and the statute of this State, regulating the manner, keeping and carrying gunpowder, are not declaratory acts, but contain new provisions and regulations."¹

This, however, was the very offense, that of a dangerous nuisance, punished in the cases cited in *Myers v. Malcolm*, and especially in *Rex v. Taylor*, where the King's Bench granted an information against the defendant for a nuisance, upon "affidavits of his keeping great quantities of gunpowder to the endangering of the church and houses where he lived," or, as it should have been expressed according to Burns, "to the endangering of the lives of his majesty's subjects." Wharton, in his *Criminal Law*, says: "Many offenses which have been punished exclusively by statute in England have been brought in this country within the common-law sanction, and have been considered misdemeanors."

A nuisance at common law is "whatever is injurious to a large class of the community, or annoys that portion of the public which necessarily comes in contact with it," and Mr. Wharton enumerates as nuisances or scandals to the community, among others, the following: "To cast a dead body into a river without the rites of Christian sepulture; to knowingly sell unwholesome provisions." These offenses are also violations of statutes and ordinances, and may be prosecuted in several ways. Indictments at common law have been sustained for throwing into a well the carcass of an animal which tainted and corrupted the water used by a family; for selling unwholesome beef as good food; and for selling unwholesome provisions.

Most of the acts complained of in this branch of our subject are either nuisances or wrongs, and are also included in the prohibitory

¹ 1 Ellis & E., 1 Q. B. 202; *People v. Sands*, 1 Johns. 78; see distinctions drawn by Spencer, J., as to cumulative remedy by statute. 1 Russ. Cr. 45, 46, 297, note; *Heeg v. Licht*, 80 N. Y. 584; *Myers v. Malcolm*, 6 Hill, 295; *Rex v. Taylor*, 2 Strange, 1168; 12 Mod. 342; 2 Burns Just. 667; see *Chicago Coal Co. v. Glass*, 34 Ill. App. 364. As to Dynamite, see R. S. Ohio, §§ 6968, 8853, 8858.

² 2 Wh. Cr. L., § 2370; 1 id., § 3; 1 Greenleaf, 226; *Kavan's case*; *State v. Buckman*, 8 N. H. 203; *People v. Parker*, 38 N. Y. 85; *Van Bracklin v. Fonda*, 12 John. 467; 2 East P. C. 822; 3 M. & S. 10; 4 Camp. 10.

legislation of special statutes, wherein new procedure and new remedies are assigned. The statutes constitute violations as misdemeanors, and also give actions for penalties, and it is well to keep in mind the distinction between those wrongs which are *mala in se* and those *mala prohibita*. "The rule appears to be that in acts *mala in se* the intent governs, but in those *mala prohibita* the only inquiry is, has the law been violated? The act must be intentionally done," says the court in *Gardner v. People*, but in such case the *scienter* need not be pleaded unless the statute requires it.¹

There was early legislation in England to prevent throwing filth into ditches and streams, but in this century, from a different view taken of the proper system of drainage and the necessary sewerage and sanitation of cities, drains, sewers and filth of all kinds were permitted to be discharged into the rivers and streams, until the evils became unbearable.² By the Nuisance Removal Acts of 1855, 1863 and 1866 and amendments, the Public Health Acts, and Local Government Act of 1875, and the Rivers Pollution Prevention Act, 1876, the policy has been to clean and purify, in every way possible, the potable water supplies of the cities and towns of the kingdom. For London we have the acts authorizing the water companies, and after the cholera epidemics those requiring the filtration of the water supplied; the Thames Conservancy Acts, 1857, 1864; the Thames Navigation Act (Pollution), 1866; Lee Conservancy Act of 1868, with their amendatory acts, and those affecting the Metropolitan Board of Works and the Local Government Board.

The experience of the year 1892, in respect to the dangers from impure water supply, as seen at Hamburg in its cholera time, recalling the observations in London following the cholera epidemics in that city, has given new vigor to the inquiry in every direction for precautions in this regard. Under the Diseases Prevention Act, the Metropolitan Asylums Board has been constituted a local board and its powers were enlarged in 1891, but the question is still of new obligations to purify the water supply by taking it from longer distances or by filtration, as well as to prevent pollution. The user and proprietary rights in lakes and streams have been the subject of litigation in several States within a few years and particularly in New York and New Jersey.

¹ *Gardner v. People*, 62 N. Y. 804; *Morris v. People*, 8 Denio, 408; *Rex v. Esop*, 7 Carr. & P. 456, cited in 1 Denio, 459.

² See 39 and 40 Vict., chap. 75.

In 1891 the case of *Sweet v. City of Syracuse*¹ was elaborately discussed in the New York Court of Appeals, concerning the rights of the defendant city, under a law of 1889, amended by chapter 314 of 1890, to take water from Skaneateles lake, about seventeen miles distant. There were objections not only from the locality, but also in respect to the powers of the city and of the legislature in permitting the use of waters held by the State for canal purposes. It was insisted that this was within the constitutional prohibition against the appropriation of public property for local purposes, but the court, after the most careful consideration, and after allowing a reargument, sustained the law and the action of the city authorities.

There is no doubt, says the court in this case, that "the State, in some sense, has a certain proprietary right in Skaneateles lake and its outlet. Lands appropriated to the use of canals are held by the State in fee. But it was not land, as such, the State appropriated in this case, but water. It becomes important, therefore, to determine the nature and quality of the right or interest which the State acquired in the waters of the lake and outlet. It is a principle recognized in the jurisprudence of every civilized people from the earliest times, that no absolute property can be acquired in flowing water. Like air, light or heat of the sun, it has none of the attributes commonly ascribed to property, and is not the subject of exclusive dominion or control. As Blackstone observes, 'water is a moving, wandering thing, and must, of necessity, continue common by the law of nature;' so that I can have only a temporary, transient, usufructuary property therein. While the right to its use as it flows along in a body may become a property right, yet the water itself, the *corpus* of the stream, never becomes, or, in the nature of things, can become the subject of fixed appropriation or exclusive dominion, in the sense that property in the water itself can be acquired or become the subject of transmission to another. Neither sovereign nor subject, can acquire more than usufructuary rights therein."

This case practically decides, as the *Middletown Village* case, in the same court, in 1880, does more particularly, that this use of water is a public use, and it more nearly represents the present views upon this subject of rights in respect to the potable water supply of any community, than the decisions referred to and relied upon in *Smith v. City of*

¹ 129 N. Y. 816; see *People, ex rel. City of R., v. Briggs*, 50 N. Y. 553; *In the Matter of Village of Middletown*, 82 N. Y. 196; 2 Blackst. Com. 18.

Rochester,¹ also in this court, in 1883, which turns principally upon distinctions in the usufructuary rights of riparian owners on small bodies of water as compared with those in other waters, and on rivers, the seaboard, and the large lakes.

In the last-mentioned case the city of Rochester, under an act of the legislature in 1873, giving it authority "to enter upon, control, and use the waters of Hemlock and Canadice lakes for the purpose of a water supply," having taken the water necessary, and claiming the right to use so much in addition, as it might need in the future, the plaintiffs, millers on the creek the outlet of a lake into which the waters of the smaller lakes flowed, began an action to restrain the defendant from diverting the waters of Hemlock lake from said creek. The court held that the plaintiffs were entitled to the enjoyment of the uniminished and undisturbed flow of these waters, and the State had no right to authorize their conversion to any other uses than for navigation, although such other uses were public in their nature, except under the sovereign right of eminent domain, and upon making just compensation. The evidence tended to show that the plaintiffs were injured by the diversion complained of, and, therefore, a dismissal of their complaint was found erroneous.

Different questions were involved in this case from those discussed in *Sweet v. City of Syracuse*, but public rights and public use have advanced in all potable water supplies, in the progress of legislation in the State of New York, as may be seen in the laws relating to Croton water supply for the city of New York. The law of 1834 was solely based upon this view of proprietary rights, and it is curious to observe, that in an act to prevent pollution in these waters in 1845, there was an apparent limitation, in that it was declared unlawful for any person to throw any dead animal or offensive matter into the Croton lake or aqueduct or reservoirs.² But the law of 1870 made it a misdemeanor to cast any noisome or unwholesome substance into the water or near any highway. The law of 1871, passed, it is true, rather for the preservation of game, than of the

¹ *Smith v. City of Rochester*, 92 N. Y. 463; see *Dermott v. State*, 99 N. Y. 101, *Silsby Manf. Co. v. State*, 104 N. Y. 562.

² N. Y. Laws 1834, chap. 256; 1835, chap. 543; 1836, chap. 468; 1837, chap. 528; 1870, chap. 575; 1871, chap. 721; 1883, chap. 291. "An act to provide for the prevention of disease or sickness caused by the overflow or discharge of water from the canals of the State into creeks or water channels."

public health, made it unlawful to cast any coal tar, refuse from gas-houses or other deleterious substance into any of the rivers, lakes, ponds or streams of the State.

The Penal Code of 1882 of the State of New York made the pollution of streams a misdemeanor, and that State in 1885 adopted "An act to confer upon the State Board of Health power to protect from contamination, by suitable regulations, the water supplies of the State and their sources." Such regulations are not to be operative in any county "until the judge of that county shall have approved of the same," and are to be published once a week for six consecutive weeks. The local boards of health, or in its default, "the corporation furnishing the water supply, or the municipality deriving its water supply from the waters, for the sanitary protection of which such rules have been made, may maintain an action for the prescribed penalty for a violation of such regulations. Any willful disobedience is declared a misdemeanor, punishable with fine and imprisonment, but the same offense is not to be subject of both civil and criminal prosecution.

A number of acts were passed in New York State,¹ after 1873, relative to the creation and operation of water companies in towns and villages, to furnish pure and wholesome water to the inhabitants, authorizing laying of pipes, condemnation of property, raising of funds, issue of bonds and making of contracts by cities, villages and towns to procure water, which must be pure and wholesome, and be furnished at reasonable rates and cost to consumers. By a law of 1892 any incorporated city or village, which has made such disposition of its sewage as not to pollute or contaminate any river, stream or lake, or other body of water, may have and maintain an action in the Supreme Court to prevent the discharge of any sewage or substance deleterious to health, which shall injure the potable qualities of water in any river, stream or lake from which it has its supply, provided such source of its supply is wholly, or in part, within the boundaries of the county wherein is located such city or village. This act supplements those giving powers to the State Board of Health for the protection of water sources, and the special laws for particular places, such as for the water of New York, Brooklyn, Syracuse and other cities.

¹ N. Y. Penal Code, § 890; N. Y. Laws 1885, chap. 543. As to such regulations adopted for several localities, see Report of New York State Board of Health, 1891, pp. 886, 892, 898. See N. Y. Laws 1873, chap. 737; 1875, chap. 181. Also, "An act to provide for the protection from pollution of certain waters of the State, 1892, chap. 285.

Massachusetts took up this subject almost as early as England, and by her public statutes sewerage, drainage and refuse and all polluting matter were prohibited from being allowed to enter rivers and other sources of water supply.¹ The Supreme Court was authorized to grant an injunction against any violation of the law on the application of any mayor or selectmen of a town injured thereby; and the State Board of Health was charged with the care of inland waters, directed to cause examinations to be made wherever there was just cause of complaint, and to give notice to the Attorney-General of any omissions to comply with existing laws. Private actions have been sustained in that State giving damages to abutters on water-courses, when, by a repair of a way, surface water was turned into a stream, and in the case of the change by a city of a water-course into a common sewer, prospective damages were allowed to riparian owners; but in one case it was held that pollution by street drainage was not actionable.

In New Jersey proof of actual injury and of existing danger is required to maintain a bill for an injunction. Thus in *Newark Aqueduct Board v. Passaic*, to restrain the discharge of the sewage of Passaic into the river four miles above the pumping apparatus for the water supply of Newark, it was held in the Court of Chancery that the form of action was mistaken, in that it should have been by information on the part of the Attorney-General; and also that the case was not made out of an actual nuisance. In *State, ex rel. Board of Health, v. The Board of Chosen Freeholders of the County of Bergen* the bill was also dismissed on similar grounds, where the complaint was again that of the pollution of the water supply of a city, and the court held that proof of a prospective nuisance, or a tendency to injury, was not sufficient. A like deficiency has been found in common-law actions for nuisances of this type in other States; but in England, in the construction of the Public Health Acts, the Nuisance Removal and Disease Prevention Acts, a broader interpretation has been used.²

¹ Pub. Stat. Mass.; Pollution of Rivers, chap. 80, §§ 96, 105; chap. 154, 1895; chap. 274, 1888; *Woodbury v. Berkely*, 151 Mass. 245; *Washburn v. Worcester*, 153 Mass. 494; *Barnard v. Newton*, 154 Mass. 255; see *Watuppa Reservoir v. Fall River*, 154 Mass. 305; Illinois R. S. Cr. Code, § 202, Defiling Water.

² 45 N. J. Eq. 398; 46 N. J. Eq. 178; *Attorney-General v. Cockermouth Local Board*, L. R., 18 Eq. 172; see *Local B. H. of B. Auckland v. B. Auckland Iron Co.*, 48 L. T. R. (N. S.) 223; *Banbury v. Page*, 45 L. T. R. (N. S.) 759; 8 Q. B. 97; *Fitzpatrick v. Kelly*, 8 Q. B. 387; *Roberts v. Egerton*, 9 Q. B. 494; 88 and 89 Vict., chap. 55. A very useful decision sustaining the principle that every riparian proprietor has the right to insist that the stream shall flow to his land in its accustomed quan-

In the Bishop Auckland case the court held that by the Public Health Acts a definition of nuisance was given, and it was not necessary to limit it to an actual injury to the inhabitants of the district. *Banbury v. Page* is in agreement with this view.

The court says: "When you complain of a man's pigs as a nuisance, he is not at liberty to say, 'you have had no typhoid, therefore do not interfere with my pigs.'" It appears to me, adds Grove, J., that "the word nuisance here, is used (in the Public Health Act of 1875) in the ordinary legal sense, and includes, in addition to the matters injurious to health, matters substantially offensive to the senses."

For adequate relief from the common notion of a few years ago, that natural streams are natural sewers, and to secure safety for the potable water supply, legislation, with such new and stringent provisions, as in England, in New York and Massachusetts, would appear necessary, although, for flagrant acts of defilement and pollution, the common-law remedies remain, and may suffice. The court may at once enjoin any clearly illegal act, or a violation of an express law, without embarrassment by such definitions as limit the common-law nuisance to proof of such actual injury, but precedents are not wanting in older reports of a larger and less technical consideration, as stated by Bronson, Ch. J., in *Fish v. Dodge*, and by the New York Commission of Appeals in *McKeon v. See*, that it is not necessary to a right of action, that the owner of a dwelling should be driven from his dwelling; it is enough that the enjoyment of life and property has been rendered uncomfortable.¹

In *Goodrich v. The People*, no injurious consequences to health had appeared, but the evidence from experts was of a tendency to injure, and of a real effect upon the health of consumers of the meat, and the defendant was held upon the indictment, and judgment appealed from.

tity, *quality*, place and level, free from pollution, is in *Indianapolis Water Co. v. American Straw-board Co.*, 53 Fed. R. 970; see, also, *Case v. Hoffman*, 54 N. W. R. 793. A distinction, however, has been made in several cases adopted by a majority of the Pennsylvania Supreme Court on fourth appeal in *Pennsylvania Coal Company v. Sanderson*, 113 Pa. St. 186, that "the use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners must *ex necessitate* give way to the interest of the community in order to permit the development of the natural resources of the country and to make possible the lawful business of mining coal," and to allow the discharge of the drainage water of a mine into the stream. But see *Rylands v. Fletcher*, L. R., 8 H. L. 830; *Pennington v. Brinsop Hall Coal Co.*, L. R., 5 Ch. Div. 769; *Smith v. Kenrick*, 7 C. B. 564.

¹ *Fish v. Dodge*, 4 Denio, 316; *McKeon v. See*, 51 N. Y. 306; *Goodrich v. People*, 3 Park. 629; *Dennis v. Eckhardt*, 3 Grant, 302.

In *Dennis v. Eckhardt*, it is said: "A chancellor does not wait till noisome trades and unwholesome gases kill somebody before he proceeds to restrain."

The New York Penal Code, in its definition of nuisance, adopts the general phraseology, that it is any act or omission "which annoys, injures, or endangers the comfort, repose, health or safety of any considerable number of persons, or in any way renders a considerable number of persons insecure in life, or the use of property, and is very similar to the definition in the English Public Health Acts, sustained in the cases above referred to.¹ The Court of Appeals, however, in 1885, in *Health Department v. Purdon*, held to the more conservative rule, that it must be made clearly to appear that the thing complained of is "either dangerous to human life, detrimental to health, or the occasion of great public inconvenience," and that the court will not, in all cases, interfere; that its "power to do so is not only conferred by the provisions of statutes, but belongs to the general powers possessed by courts of equity to prevent irreparable injury, and obviate damages for which no adequate remedy exists at law.

City and village ordinances prohibit not infrequently the use of well-water because of its unavoidable contamination from surface drainage, and this regulation has long been maintained in the city of New York. In villages and towns, under the jurisdiction of boards of health, or subject to the regulations framed by the State Board of Health, privies and out-houses are forbidden within fifty feet of wells, as a necessary prevention against disease.

Adulterated or corrupted food for man, unwholesome and dangerous to life and health, cannot be dealt in under penalty of the law, as we have heretofore seen. There is a remedy by indictment, and also by civil action, at the suit of parties sustaining special injury by the unlawful acts of the vendor of such food. In a recent case, *Swain v. Schieffelin*, defendant sold to the plaintiff coloring matter for ice cream, which, being used, made customers sick, and the New York Court of Appeals held that not only could recovery be had in a civil action for

¹ N. Y. P. Code, § 385; *Health D. v. Purdon*, 99 N. Y. 241; N. Y. Cons. Act, 1882, §§ 636, 637, 646. A curious well-water case is to be found in *Danaher v. City of Brooklyn*, 119 N. Y. 241. An action brought to recover damages for the death of D., alleged to have been caused by drinking unwholesome water from a well belonging to the defendant, and under its control. It was held, that while it was the duty of the city to use reasonable diligence to guard against danger from its use, it was not an insurer of the quality of the water," etc.

the loss of the cream in which the coloring matter was used, but for injury to business through loss of trade due thereto. An indictment would also have lain in this case. But on a general sale of merchandise, there is no implied warranty that the article is sound or fit for merchantable purposes, and the general common-law doctrine of *caveat emptor* applies, and this has been repeatedly upheld in many courts. Thus, in New York State, in the case of *Moses v. Mead*, where one hundred and forty-nine barrels of mess beef were sold, which proved to be tainted and unwholesome, the special verdict for the defendants was upheld.¹

Another element, however, enters in, and deception in the sale of foods and drugs may be, and now commonly is, restrained by statutes which constitute offenses for any violations of the provisions of the law, and the standards and regulations of purity, established under the police power of the legislature. Public policy intervenes, and, as shown in a preceding chapter, under the decisions quoted, of the courts of New York, Massachusetts, Pennsylvania, New Hampshire, and other States, any necessary or expedient prohibition to prevent deception of the public may be sustained, even though the manufactured and adulterated article be neither intrinsically harmful or unwholesome, or though it be dealt in as merchandise. Inspection laws have been, at some time, adopted in every State and country to preserve the credit of some of its products and manufactures, and it is but an extension of the same power to fix standards for these articles from which no variation is allowed, although, in some instances, the standard itself is artificial and permissive of some kind of adulteration. In New Hampshire, a pink coloring substance was required to be added to oleomargarine, and by the statutes generally, of drugs, the standard of the pharmacopeia is required; and of food and drink, compounds are sanctioned within the limits prescribed for them.²

¹ *Rex v. Vigg*, 2 Salk. 7; *Goodrich v. People*, 3 Park. Cr. 622; *People v. Parker*, 38 N. Y. 85; *Health Dept. v. Purdon*, 99 N. Y. 241; *Gould v. City of Rochester*, 105 N. Y. 49; *Swain v. Schieffelin*, 134 N. Y. 471, cites 101 N. Y. 205, as to rule of damages; *Rex v. Dixon*, 3 M. & S. 11; 2 Kent Com. 480, and note; *Moses v. Mead*, 5 Denio, 617; 1 Denio, 378; *Hart v. Wright*, 17 Wend. 267; *McFarland v. Newman*, 9 Watts, 355.

² See Chap. V, s. v. Oleomargarine; 114 N. Y. 61; 156 Mass. 236; 114 Pa. St. 265; 123 U. S. 623; 36 Minn. 69; 77 Mo. 120; 5 N. J. L. 534; 156 Mass. 236; see *Turner v. Maryland*, 107 U. S., and note, pp. 51-54; chap. 407, 1881, N. Y. L. In Geneva, Switzerland, and in other cities of Europe, the fineness of gold to be used in jewelry, watches, etc., was prescribed.

Under the law of New York, food is defined to be "every article used for food or drink by man." In the case of drugs, an article is deemed adulterated if it differs materially from the standard of strength, quality or purity laid down in the United States Pharmacopeia, or if not recognized there, in any standard work, or *materia medica*; or if its strength or purity fall below the professed standard under which it is sold; in the case of food and drink, if other substances have been mixed with it, or any valuable constituent abstracted, or if it be an imitation of or sold under the name of another article, or if it contains any added poisonous or injurious ingredient. This provision, however, does not apply to mixtures or compounds recognized, as ordinary articles of food, if not injurious to health, and if the articles are labeled as a mixture and the components mentioned. The State Board of Health is authorized to prepare and publish lists of articles, mixtures or compounds excepted from the provisions of the act, and the agents of the board may require samples to be sold to them for analysis by any person offering or exposing for sale any article of food or drugs. Any violation of the act is a misdemeanor, and punishable by a fine.

The English law is not dissimilar, and laws of this character and method are found in many of the States. In addition, special laws, governing certain commodities, such as milk and all dairy products and wine, or regulating the sales of meats, fruits and vegetables, are not uncommon. City and village ordinances also deal with these subjects, but principally as affecting the public health and safety, and the Sanitary Code also provides for them. These offenses, defined and prohibited by these statutes, are to be prosecuted according to their terms, and varying, as these often do, we cannot avoid the necessity of examining the particular enactment under which a question may arise, to ascertain its definitions and conditions as well as the remedy prescribed, when we leave the field of the common law and enter upon that of adulterations and standards by which they are to be measured. For example, in the law of 1888, to prevent the manufacture and sale of adulterated food or drugs in the District of Columbia, we find a number of exceptions and provisos, and the Commissioners of Internal Revenue are authorized to declare articles and preparations exempt from the provisions of the act. This is a similar provision to that in the New York law, which allows the issue of permits for compounds in certain specified instances.

The offenses reached by our common law under this title are, many of them, prohibited by the Code Napoleon and the Penal Codes of Russia, Holland and other countries. The adulteration of bread with copperas, is there mentioned, while alum elsewhere is most apprehended. The leading case of *Rex v. Dixon* illustrates this, and also the force of the presumptions which have now grown somewhat familiar by their general recognition; that a master is liable for the acts of his servants done in the course of their employment, and that a tradesman, whose business is to deal in articles of food for man, is presumed to have known their qualities¹ when he has sold such as are corrupted and unwholesome. In this case, while it was shown that alum might be so mixed with flour as to be innoxious, yet as used by the baker's servants in an unskillful way, it made the bread unwholesome, and the sale for the supply of children must be construed to mean that the bread was delivered for their eating.

The principal difficulty has been in the proof of adulteration, where the question was of variance from an accepted standard of purity, in any way permissive of sophistication, or allowing for mixtures and compounds which are articles of trade and commerce. When knowledge or intent is to be shown, as, apparently, under the District of Columbia law, the difficulty increases.

It was said of the English Sale of Food and Drugs Acts of 1875 and 1879, that while in their terms the manner of proof was given, the fact of adulteration was made to depend upon the definitions and opin-

¹ *Rex v. Dixon*, 8 M. & S. 11; *Comm. v. Waite*, 93 Mass. 264, where the court says: "No man is obliged to go into the business, and by using proper precautions any dealer can ascertain whether the milk he offers for sale has been watered." See declaration of N. Y. State Board of Health as to canned peas and beans, Session Laws of 1886, p. 949. As to the penalties on bakers, 1 and 2 Geo. IV, chap. 50; 1 Russ. Cr. 109; *Attorney-General v. Siddon*, 1 Tyrw. 41; *Opinion of Balcom, J., Goodrich v. People*, 3 Park. Cr. 627; *Schrumpff v. People*, 14 Hun, 10. In *Rex v. Medley Co.*, 6 Carr. & P., Lord Denman, C. J., held that the managers and directors of a gas company were liable for the acts of their superintendent and engineer in creating a nuisance, "though they were personally ignorant of the plan adopted, and though such plan be a departure from the original and understood method, which the directors had no reason to suppose was discontinued." *Brown v. Foot*, Q. B. Div., July 16, 1892, 46 Alb. L. J. 127. The servant of a milk salesman, employed by his master to sell milk, adulterated it with water. The master was convicted as the seller of the adulterated milk under the Food and Drugs Act of 1875. Held right, whether the master did or did not connive at the offense.

ions of the analysts who did not always agree. The exception was in the case of spirituous liquors.¹

In Massachusetts, in spite of stringent laws, and especially that of April 20, 1872, the report of the State Board of Health set forth that the most efficient of the checks provided was in the publication of the names of the guilty holders and sellers of adulterated articles.² In one case, where the instructions of the employer, given in good faith to his servants, as to the sales to minors, were disregarded, the master was acquitted,³ but in general regulations, such as those of the Sanitary Code of New York, are most easily enforced, and intent need not be proved, while the master is liable for violations, with the servants whom he is bound to supervise and control. The prohibitions are either of any adulteration or mixture; or of any articles unwholesome and injurious to health; or of articles sold under deceptive names, directions or pretense.

The world has got used to frauds and adulterations in all the articles under this title, and only the positive terms of a prohibitory law, or, on the other hand, actual injury by which unwholesomeness is shown, will suffice to restrain violations. Fifty years ago there were eight manufactories in London where exhausted tea leaves, bought up in coffee-houses, were prepared for sale, and finished with pink and black lead, and the adulterations of coffee, bread and cocoa, butter, sugar, tea and oatmeal, wine, whiskey, honey, pepper, vinegar and drugs of all kinds have been constantly enumerated, and are as old as the trade itself, which embraces them.

The simplest and at the same time most important adulteration of

¹ Chambers' Encycl. 1892; s. v. Adulteration. "An act to amend the laws for the Prevention of Adulteration of Food, Drink and Drugs, 1872; Sale of Food and Drugs Acts, 1875-1879; Adulteration of Intoxicating Liquors, 35 and 36 Vict., chap. 94; see Adulteration of Seeds, 32 and 33 Vict., chap. 112; see N. Y. L., chap. 608, 1887, An act to prevent the manufacture or sale of adulterated wines, etc.

² See Mass. G. Stat., chaps. 149, 166; 19th Report Mass. State Bd. of H., 1887, p. 172; 9th Report N. Y. State Bd. of H., 1889, pp. 529, *et seq.*; Gen. Laws Minn., chap. 7, §§ 1, 2; Stoltz v. Thompson, 44 Minn. 271; R. S. Ohio, §§ 8805-8809; Cook v. City of Buffalo, 16 Weekly Digest, 8; People v. West, 106 N. Y. 298; People v. Briggs, 114 N. Y. 56.

³ Commonwealth v. Stevens, 158 Mass. 4; Sanitary Code, §§ 14, 15, 16-20-48; Chambers' Encycl., 1892; Accum's Food Adulteration, 1820; 51 Hen. III, Stat. 6, chap. 7; 13 Car. II, chap. 25, § 11; Fitzpatrick v. Kelly, 8 Ct. Q. B. 337; Roberts v. Egerton, 9 Ct. Q. B. 494; 4 Blackst. Com. 161; 1 Russ. Cr. 109; Hassall Adulteration of Food. As to liability of master for acts of his servant, Att.-Gen. v. Siddon, 1 Tyrw. 41; Brown v. Foot, Eng. Q. B. Div., July 16, 1892, 46 Alb. L. J. 107.

food is that of milk by water. Practically no other adulterant is to be feared in commercial milk, and milk is skimmed and thus robbed of some of its most nutritious natural qualities. It is estimated that in London alone the sum of £80,000 is annually paid for water sold as milk. This robbery, in Paris, has been shown to be enormous. And in 1876, in New York, it was ascertained that above one hundred thousand quarts of water were added to the milk, and sold as such in the daily milk supply of the city.¹

This matter of universal concern was not successfully adjusted, even so far as concerned the prosecutions for violations of the laws upon the subject, until it was determined, first, what was an adulteration, and second, what were the practical tests. More than twenty years ago the standard of minimum purity of the milk, which comes in large cans to the cities, and is thus the product of several cows, and, therefore subject to no abnormal variations, was ascertained and accepted the world over, by specific gravity 1029, or in some cities 1030. It was fixed, says Christian Müller in his treatise of 1872, from many thousand samples, that the milk, which is divided as a trade commodity from the physiological milk, ranges from 1029 to 1033. And Wanklyn in his book, representing in 1874 some criticisms upon the specific gravity tests, yet adds, "in dealing with milk supply on a large scale, we are little concerned with the possibility of single animals giving abnormal milk, and need only concern ourselves with milk of normal quality, all departures from the standard being looked upon as sophistications."

These facts, demonstrated by many thousands of additional examples, especially in the city of New York from 1875 to 1892, were available in the use of the lactometer, an instrument so graduated that on being immersed in the milk under examination at the temperature of sixty degrees Fahrenheit, it rose or sank by the zero mark, which was of the minimum standard, and the simple fact was shown that the milk was above or below the standard. The measurement could be made and the scale read by any person of ordinary intelligence. Under the ordinance of the Sanitary Code, prohibiting any adulteration or any

¹ Chambers' Encycl., 1892; Annual Report of Local Government Board, Eng., 1891-2; Chr. Miller Treatise, p. 42; Wanklyn, p. 41; "Du Lait" Marchand, pp. 36-41; Tardieu v. Dict. D'H. p. 521; Schrumpff case, 14 Hun, 10. The Local Government Board Report, recently published, says there has been a diminution in the food adulteration observed in several periods of five years compared, and that "milk is, of course, the article most tampered with."

change of milk by the addition of water or the removal of cream, this one fact was sufficient.¹ The color, the taste and the appearance of milk in the glass were also tests to the expert or the milk dealer, and so far as experience has shown, always coincided with the lactometer. The institution of these tests in New York city was made certain by the trial of Daniel Schrumpff in the Court of General Sessions in the city of New York at the December term, 1876, when some ten days were occupied and many of the distinguished chemists and experts of the United States were heard, while milk and water adulterations and the certainty of the lactometer were determined by the jury itself observing and directing the demonstrations in open court. The conviction in this case was sustained on appeal, and has not been at any time so far successfully questioned. Prosecutions for skimmed milk followed, and were equally supported. There came in time, however, other considerations into the legislation, and in several countries, springing doubtless from the apprehension that in some single instance a sample of milk might vary from the standard of specific gravity.

An arbitrary standard was fixed by law, as follows: That milk shown to contain more than eighty-eight per centum of water or fluids, or less than twelve per centum of milk solids, which shall contain not less than three per centum of fat, shall be declared adulterated, as also milk drawn from cows within fifteen days before and five days after parturition.² This standard had, of course, to be investigated by analysis, and speedily the same difficulties reappeared as spoken of under the English Food and Drugs Acts, namely that the opinions of the analysts differed, and one and another method of analysis was preferred, even while it was palpable there was some sophistication, so that three and one-half per centum of fat was understood to be more

¹ Among other cases, *Cox*, 7 Hun, 214; *Schrumpff*, 14 Hun, 10; *Blaisier v. Muller*, 10 Hun, 435; *Pollnaky v. People*, 73 N. Y. 65. *Skimmed milk*, *People v. Gray*, N. Y. General Sessions, before Recorder Smyth, 1887; *People v. Thorne*, Special Sessions, Dec. 5, 1885. Appeal General Sessions, Hon. H. A. Gildersleeve, J., April 22, 1886. Böttger's appeal from N. Y. Special Sessions, May 21, 1888.

² Law of N. Y., chap. 202, § 18, 1884. This is, in many provisions, a stringent law, and prohibits the sale of "skim milk," except to skim cheese factories. It requires the name of the county where the milk is produced to be branded on every can, vessel or package containing milk, except in the county of its source. It was amended by supplementary acts in 1886-1887, and by chap. 550, 1888. By chap. 290, 1878, N. Y. laws, every can or vessel containing skimmed milk must be so marked. By chap. 397, 1889, when the milk is destroyed by an official, he shall first take and deliver a sample to the vendor or person in charge.

nearly consonant with a standard which would be represented by the minimum of 1029 of specific gravity. Wherever, therefore, the law or ordinance was not in relation to commercial milk, or is not prohibitive of any and all changes, either by the addition of water or by the removal of cream, the legal standard under the particular law must be examined, and by it the tests proved.

This much of explanation of the details even of evidence has been given, because these milk cases have been of exceptional interest and importance, and in several cities have originated a practical course, if not code of procedure, with very important results in the betterment of the milk supply. The specific gravity test, at sixty degrees Fahrenheit, by the lactometer however, remains the most available, the most general, and to dishonest milk dealers the most formidable of all tests, whether merely to detect, or to prove the suspicious character of this commercial product as it is frequently seen in our cities.

It is used sometimes in conjunction with analysis, which almost invariably discloses a larger degree of adulteration than the lactometer. In either event, and in any case, a standard must first be accepted, whether by specific gravity, or by other analysis of the constituents of the milk solids, to separate the necessary three or three and one-half per centum of fat. Incidents of the adjudications are suggestive in other food cases. As to the adulteration, the question became only whether one read the scale aright. As to skimmed milk, which was claimed to be nutritious and beneficial in diet in the Gray case, in New York General Sessions in 1881, the jury had submitted to them the question, which is apparently outside of the ordinance, whether skimmed milk be wholesome, in view of the facts that it was commercial milk, and that to skim the milk it has to be kept a day over. Some of the milk was shown to be from twenty-four to thirty-six hours old when sold. The jury found skimmed milk unwholesome. The destruction of milk and unsound vegetables, fruits and meats entails no reprisals or damages if a violation of the law or ordinance is proven. As it was said in the Blazier case: "The functions of the inspector under the ordinance in question are simply ministerial. He is to destroy the milk if it is found below the prescribed standard; otherwise, not. In order to ascertain whether it is below the standard, he has only to measure its specific gravity by an instrument made for the purpose. He has no discretion in the matter. It is immaterial, therefore, whether the owner is present or not. If present, he could not change the result. The ordinance, therefore, was valid and was a

complete justification to the defendant."¹ A general statute of the State is not exclusive of an ordinance prescribing additional regulations for the same traffic within the local limits. Thus, in *Polinsky v. People*, there was a statute of the State of New York regulating "the selling and exposing impure or adulterated milk for sale, while the ordinance embraced another and distinct offense, viz., bringing adulterated milk into the city of New York for sale, of which the court says, it might be considered that this deserved severer punishment, than the sale of it by small dealers to whom they furnished it. In *People v. Mulholland* an ordinance of the city of Syracuse prohibited the peddling or delivery of milk from any vehicle in the streets, and the appellant, an employee of the Onondaga Milk Association, set up the privileges granted by charter to his company, but the court held the ordinance lawful, and that "the corporation was affected by the lawful ordinances of the city, the same as an individual."

This subjection of rights under charters, licenses, patents, and general laws, to the local police power and jurisdiction, is neither peculiar nor recent; and while in the cases previously cited² of the *New Orleans Gas Co.*; *Coates v. Morgan*; *Stone v. Mississippi*; *Fertilizing Co. v. Hyde Park*; and in *Weber v. Virginia*, this principle is exhibited, and also that other, that the State does not, and never can, divest itself of the police power, and its duty to protect the public health and safety, the analogy in the rules and practice governing in milk cases and in those relative to "burning oils unsafe for illuminating purposes" is evident.

Here, also, we have local regulations, and standards, and not infrequently a testing machine which will mechanically and unerringly mark the deficiency suspected in inflammable oils. In *Patterson v. Kentucky* an indictment under a State law for the offense of selling

¹ 10 Hun, 437; *Bouton v. Nellson*, 3 Johns. 474; *Freeman v. Cornwall*, 10 Johns. 470; see opinion of Ruger, Ch. J., 99 N. Y. 241; *Health Dept. v. Purdon*, *McKay v. City of Buffalo*, 9 Hun, 401, and cases cited; affirmed, Ct. of Appeals, Oct. 4, 1878; *Smith v. City of Rochester*, 76 N. Y. 506; *Hafford v. City of New Bedford*, 83 Mass. 297; *Dargon v. Mayor of Mobile*, 81 Ala. 469. In respect to health ordinances it has been repeatedly found, in cases arising in the courts of New York city, that they justified the destruction of articles held or offered for sale contrary to their provisions, for which there could be no recovery.

² 73 N. Y. 70-71; 82 N. Y. 324; *Bish. Stat. Cr.* §§ 20-23; *Dill. Mun. Corp.*, chap. 12, 804-809; *Rogers v. Jones*, 1 Wend. 237; *Com. v. Kidder*, 107 Mass. 188.

³ 115 U. S. 650; 7 Cow. 584; 97 U. S. 659; 101 U. S. 814; *Patterson v. Kentucky*, 97 U. S. 501.

within the State of Kentucky casks of "Aurora oil" which had been previously branded by a State inspector with the words "unsafe for illuminating purposes," was sustained. Letters-patent had been duly issued for this as "an improved burning oil." Upon the trial it was agreed that the Aurora oil could not, by any chemical combination described in the patent, be made to conform to the standard or test required by the Kentucky statute as a prerequisite to the right, within that State, to sell, or to offer for sale, illuminating oils of the kind designated. The United States Supreme Court held that "the right, conferred upon the patentee and his assigns, to use and vend the corporal thing or article brought into existence by the application of the patented discovery (of 1887), must be exercised in subordination to the police regulations which the State established by the statute of 1874. If the substance is necessarily and essentially explosive and dangerous, it would, of course, come under the same provisions against dangerous nuisances, which, both by common law and by statutes, authorize indictments. This we have seen in the cases cited at the beginning of the chapter, *Heeg v. Licht*, *Rex v. Taylor*, and others, of keeping gunpowder near dwelling-houses, and the statutes relative to dynamite and other explosives. The dangers however in these oils found in their use, are not immediately apparent, but as shown in the appalling statistics of casualties from overflowing and exploding lamps, they are to be prevented only by care in examination, with adequate tests.

The Sanitary Code of New York prescribed a not unusual test as follows: "It shall not evolve an inflammable vapor at a temperature below 100 degrees Fahrenheit thermometer." The control of this matter, however, was taken from the Health Department under the decision in the New York Court of Common Pleas, in *Metropolitan Board of Health v. Schmades*, where it was held that "the legislature having regulated the standard of petroleum, etc., and the mode of storage thereof, it is not competent for a board of health to impose further restrictions, the jurisdiction of offenses having been conferred upon a co-ordinate department, the Fire Department of the city." This decision, except for the last-mentioned consideration, and also that it was given when there was a change in the charter of the city, would

¹ 3 Daly, 282; chap. 292, 1882; see reports and experiments on the Michigan standard of a flash test at 140 degrees Fahrenheit, and also as to the dangers from even high test oil, in cases of unusual exposure and accident, as for instance when the chimney of the lamp itself is broken; Fifth Annual Report Michigan State Board of Health, 1877, pp. 75-77.

have probably been subjected to a review, but it illustrates the difficulties and differences in this class of cases. The prosecution was under the ordinance of the Sanitary Code, established in 1867 pursuant to a law of the legislature of New York State of 1866, and the statute followed by the court is of 1866, and "enacts that no refined petroleum, kerosene, earth, or rock oil, or machinery oil, shall be kept upon sale, or sold within the corporate limits of the city of New York, the fire test of which shall be less than 100 degrees Fahrenheit." This, says the opinion of the court, is another and different test, and implies that petroleum may be sold if it be of that test, while it would be forbidden under the ordinance quoted. This interference of ordinances and general laws is not likely to cease, but it has brought many cases into court.

In 1882 the legislature of the State of New York passed "An act to regulate the standard of illuminating oils and fluids, for the better protection of life, health and property, and made a standard of inflammable vapor at 100 degrees Fahrenheit for illuminating oils, and 300 degrees for oils and burning fluids used or carried in cars and steamboats, with certain provisos. It made it the duty of the State Board of Health to recommend and direct the nature of the test and instruments by which the illuminating oils shall be tested," and also to collect and examine suspected samples. Care was taken in this act to prevent its failure by any interference with other or local laws, provided for in its sixth section, and all district attorneys are required to prosecute, in behalf of the people, all cases of offenses arising under the provisions of this act. The State Board recommended and prepared the testing machine, and when in October, 1882, a Mrs. Gay, living in Batavia, N. Y., taking a lighted kerosene lamp, accidentally broke it, and there was such an explosion as to set the house on fire, in which one life was lost, an indictment was sought against Nobles, who had furnished to dealers in Batavia the oil which was the cause of the catastrophe. The indictment¹ was tried at the Court of Sessions of Genesee county, April 17, 1883, and a conviction had. Experts and inspectors for the people and those employed by the State Board of Health proved the tests, and Professor Lattimer testified that oils of the same sample flashed at 75, 77, 78, 80, 92, 94 degrees.

¹ "The Nobles oil suit was reported at length in the newspapers of the vicinity but was not appealed and did not get into the law reports;" see Spirit of the Times, Batavia, April 21, 1883.

The defense, aided by large dealers and producers of oil, called experts and proved that this oil flashed at 104; that it had passed the fire test approved by officers of the Fire Department of Buffalo and New York and was shipped in a barrel branded as inspected. These tests were shown to be insufficient under the regulations of the State Board of Health and did not avail as a defense. The standards, tests and instruments for enforcing the law vary according to the judgment of the State as expressed in the terms and provisions of the statutes adopted. The United States Supreme Court says of the legislation in *Patterson v. Kentucky*: "It is in the best sense a mere police regulation, deemed essential for the protection of the lives and property of citizens." It "belongs to each State under its own sense of duty, and in view of the provisions of its own Constitution. Its action in these respects is beyond the corrective power of this court."

CHAPTER VIII.

VITAL STATISTICS.

No longer reserved to the census, or to special inquiries, vital statistics have become a subject of new statutory requirement, as their importance was seen to determine measures of public safety against diseases, pestilence and epidemics. The Massachusetts State Board of Health, in its report of 1877, relates the history of English legislation from the first attempts at registration after the plagues in London in the sixteenth century, the organization of the Poor Law Board and its inquiries, the act of Parliament in 1837, finally the act of 1874. It describes the Massachusetts laws with increasing demands for details of examination and reports, and adds: "It is not too much to say that modern sanitary science owes its existence to the registration of deaths and the localization thereby of unsanitary conditions. It has been very much advanced, too, by the careful enumeration of cases of sickness as well as of deaths, whereby epidemics and locally prevalent diseases have furnished the means of scientific study, from which general laws have been learned, and through which State medicine has become a necessity of modern life." The registration of diseases is an important part of this work, and in 1874 the British Medical Association appointed a committee to consider the best method of acquiring the necessary facts, by whose reply in 1876, the reports from families, friends, kinsmen, householders and others, as occasion arose, were found essential.

In 1872 Holland passed a law upon this subject, and the Imperial Board of Health in Germany, the Local Government Board in England and the New York State Board of Health have published frequent and prompt returns from cities and districts, which give a survey at once of every invasion of disease, and the signs in advance of every approaching pestilence. The English law of 1874 adopted provisions already in force in Scotland, compelling physicians to return certificates of death; and Massachusetts followed this example a few years later;

but fault was found that burials were not sufficiently regulated, and permits for the transportation of dead bodies on railroads and public routes, with conditions fixed to preserve the public health, were not obligatory.

The State of New York had not been supine in this matter. In 1847 was passed "An act providing for the registry of births, marriages and deaths," which required returns in every school district of the State, of births, marriages and deaths, and the particular diseases and causes of death to be reported to county clerks and thence to the Secretary of State. Further provisions were made for the city of New York by the law of 1853. Clergymen, magistrates and other persons who performed the marriage ceremony, physicians and midwives who have assisted professionally at births, clergymen officiating at funerals, and sextons who have buried deceased persons, were required to keep registries, to allow them to be inspected, and to report therefrom to the public authorities, and coroners were directed to conform to provisions of the act.

In the laws¹ establishing the Health Department of the city of New York in 1866 and 1867, and the charters of the city amended in subsequent years, the Bureau of Records for the registration of all necessary vital statistics was established and continued, and in the Sanitary Code, adopted in 1867, the system was completed, including the exaction of permits for every interment and for the transportation of dead bodies.

In 1880, the State Board of Health, on its organization, was given the supervision of the State system of registration of births, marriages and deaths, and in 1885 was passed "An act for the preservation of the public health and the registration of vital statistics," and in 1886, "An act to prevent the spread of contagious diseases," which provided for the conditions of a permit "Whenever the body of any deceased person is to be transported over the railways of the State, or upon any passenger steamboat," etc. The Attorney-General of the State, in 1885 and in 1891, pronounced the obligations of these laws enforceable against the officers mentioned, and clergymen, magistrates, physicians

¹ Chap. 153, 1847; chap. 75, 1853; chap. 380, 1864.

² Chap. 74, 1866; chap. 956, 1867; chap. 189, 1870; chap. 335, 1878; chap. 410, 1882; Sanitary Code, §§ 151-163; chap. 322, 1880; § 7, chap. 270, 1885; see Fifth Annual Report N. Y. State Board of Health, pp. 67-69; Eleventh Annual Report, pp. 552-554. Chap. 431, 1881, and Supplemental Act, chap. 351, 1882, make it the duty of the Board of Health in each town, village or city to have a registration of deaths, diseases, and causes of death, etc., etc., and to designate the persons who shall grant permits for burials, and also to supervise the registration of births, deaths and marriages; chap. 329, 1886, as to transportation of dead bodies, and § 155, Sanitary Code.

and others, who are compelled to make reports, as prescribed by the regulations of such authorities within the jurisdiction, where they exercise their functions and discharge their offices, and their duty is. Sufficient provision is made for the enforcement of these laws and ordinances, and in the city of New York for many years in deaths the registration has been nearly complete so far as number is concerned. These laws lack one essential feature to be found in most of the laws of foreign countries, viz., that of an investigation and authentication of the facts reported, and also the consequent official responsibility for their accuracy.¹

The "death view," so called, the personal identification in the other reports, and an examination previous to the entry of a report to establish its reliability, or subsequently for a correction, have not yet been attained in our legislation, probably because their importance has not yet been appreciated, and because the origin of these laws was in other necessities of the State than those of sanitary science, which is always of the latest development. The registers of each class are to be closed each year, new ones opened and a judicial process is required to make any changes in the record when once completed.

Such are the regulations which are most approved, but under many American laws promptness in making the returns is presumptive of their genuine character, and except for flagrant fraud, little opportunity is given to challenge or traverse a report or a record, which may involve character or property. In New York city, the somewhat incongruous penalties of the law of 1886 have been carried into the City Consolidation Act, and the prosecution of clergymen, physicians and others for not keeping the prescribed registers varies, as it may be undertaken under that law or the Sanitary Code, and the original reports from that city are not required to be sent to and filed with the State Board of Health.

Other cities had in charters, and by their own ordinances, regulations of this subject, and further information might be required of any physician by affidavit respecting "any patient sick with pestilential, contagious or infectious disease."² Throughout this legislation, in the

¹ The law of Germany is probably the most perfect; see Laws of Belgium, England, Norway and Sweden, Holland and France; N. Y. Laws, § 13, chap. 74, 1866; § 605, chap. 410, 1882.

² See opinion New York State Attorney-General, 1885; Report of Board of Health, p. 67; chap. 884, 1854; see Brooklyn charter and Buffalo charter, chap. 322, 1860, § 6; chap. 74, 1866, §§ 13, 15, 16, 25; chap. 275, 1850, § 37; chap. 74, 1866, § 25; N. Y. City Cons. Act, 1882, § 585; id., § 50.

State of New York, and elsewhere, so far as we have considered the demands made for information on these topics, often regarded as in the same sense confidential, as are the purely police records, so called, the purpose of the State and local authorities has appeared to be to make it statistical, and, as indicated in the health laws, enjoining the duty upon Boards of Health, "to take cognizance of the interests of health and life among the people of the State; make inquiries in respect to causes of disease and especially of epidemics; investigate the sources of mortality and the effect of localities, employments and other conditions upon the public health; obtain, collect and preserve such information," and "promptly cause all proper information to be sent to the local health authorities in any city, village or town in the State, which may request the same." No likeness to bureaus of citizenship, such as are known abroad, with regulations of the civil status and corresponding obligations for the citizen, and no rights of private use of the records, are recognized.

The Board of Health in New York city was authorized to establish reasonable regulations as to the publicity of its records and proceedings and such information as may, in its opinion, be useful concerning births, deaths, marriages, sickness, etc. By an apparent omission in the law of that city, no limitation was made, in the charter of 1873, of the right of a taxpayer to demand a certified copy of books, accounts and papers in any department or bureau of the city government, except the Police Department, and he was not restricted in express terms to accounts and papers in the financial and other ordinary business of the corporation, wherein the taxpayer, in this relation to the government, has distinguishable rights. The suggestion to apply this provision to a private use of these records of the Board of Health grew out of the desire of foreign-born citizens to furnish certificates under some official seal, similar to those of bureaus of citizenship in European countries, where, on frequent occasions, and even for entrance into schools, and for marriages or inheritance, they are requisite. It was on this side that legal questions arose, where there was an omission to report a birth or marriage, or some error was alleged in the names or statements and dates in returns, and certified transcripts were sought for private use. The laws were not changed to secure this object or accuracy, but some concession was made in the Laws of 1880, that "births of children, which failed to be recorded through the neglect of the physician or other medical attendant present at such birth," may be recorded in the Bureau of Vital Statistics of the Health Department

in a special book, to be kept for such purpose, upon application, in such behalf, by the parents or guardian of such children.¹ Transcripts of any record in said Bureau of Vital Statistics may be given, in the discretion of the Board of Health, to a parent or the next of kin, but no transcripts of false or fraudulent returns made to said bureau, nor of the entries thereof, shall be given, and they shall be canceled upon due proof of the facts to the Board of Health. No change or alteration shall, at any time, be made in any of the records of the said Bureau of Records, in said city, without proof satisfactory to, and upon approval of, the said Board of Health."

By *certiorari* and applications for mandamus, frequent recourse to the courts in the city of New York was had, but the decisions sustaining the control of the records resting in the discretion of the Board of Health did not reach the courts *in banc* or regular reports. Several cases present the current of authority, and of the opinions. *In re Rosenbaum*, Mr. Justice Beach, in the New York Court of Common Pleas, said, April 12, 1881: "It would be far more in consonance with progress and custom if the law provided a course of procedure giving a certainty and formality to these records, entitling them to an equal credence with those kept in other countries. But it does not, and the existing system seems devised only for statistical information. After the lapse of twenty-three years, had this court the power, its exercise would be unwise, because the resulting certificate would not be entitled to any weight. Although this application seems to be in good faith, yet others might arise, conceived in deception and intended to accomplish a fraudulent purpose, by imposing upon tribunals or officials in countries where, from due formalities, such certificates are regarded as evidence of the facts recited."

In *People, ex rel. Franziska Noll, v. The Board of Health*, the application was to record a certificate of birth which was alleged to have occurred in 1864. Mr. Chief Justice Davis denied the application in the New York Supreme Court, December 30, 1878, with the following memorandum, viz., "The motion should not be granted; the duty of the Board of Health is to make record upon the evidence prescribed by the statute. Such evidence is not offered to them in this case; nor, indeed, any such proof as could justify the court in holding that the board had abused their discretion."

In the same court, April 28, 1879, Mr. Justice Lawrence, *In re Virginia Louise Meert*, denied an application for a mandamus to com-

¹ Chap. 259, 1880; § 807, N. Y. Cons. Act.

pel the board to receive the return of a birth on similar grounds. It had happened, on several occasions, that mandamus had been obtained to change hospital records from which transcripts had been entered in the Bureau of Vital Statistics, and later it was shown that the names of the parents had been falsified, and in several cases a putative father designated, in the apparent expectation that it would escape his attention. The Criminal Court had also to do with an attempted fraud on an insurance company by fraudulent returns and entries of a reputed death. A certificate of death of one Louisa Germs in due form, with all details filled in, and as of March 29, 1874, was promptly returned to the register of records, and a personal explanation of the cause of death made by a Doctor Ernest Uling. Foul play was afterward suspected, and the supposed remains were exhumed for a *post-mortem* examination, when it was discovered that the coffin's "contents were bricks, carefully packed, wrapped in newspapers, and held down in their position by laths."

Complaint was also made that in the returns various errors appeared. Under the law of 1885 a curious litigation arose, and an injunction was sought by undertakers, to prevent the exaction of a second permit of burial and the payment of fees therefor, when from the neighboring cities of Brooklyn and New York permits had been duly issued for burial in a cemetery within the limits of the Newtown Board of Health. The N. Y. Supreme Court, General Term, in the Second Department sanctioned this application.¹

The necessity of these laws was their justification. It was held in the Coates' case, in the N. Y. Supreme Court in 1827, that neither charter rights nor previous public acts are in the way of regulating, or of preventing the interment of the dead within a city, and in that case it was held that "necessity, as used in the statute, is nearly synonymous with expediency, or what is necessary for the public good; and in *Vanderbilt v. Adams* the same court held that the sovereign power may and ought to prescribe the manner of using individual rights. Every public regulation in a city may, and does in some sense limit and restrict the absolute right that existed previously. But this is not considered an injury. So far from it, the individual, as well as others, is supposed to be benefited." It is consistent with such purposes in government that not only reports of sickness and death, and burial and

¹ Report of N. Y. City Board of Health, 1873, pp. 349-350; L. 1885, chap. 270; *Eichelberg v. Board of Health of the Town of Newton*, 47 Hun, 871.

² 7 Cow. 585; 7 Cow. 852.

transit permits are required, but also the same vigor should exist for the exactions of birth and marriage certificates. Even funerals are necessarily scrutinized, that there may not be from such occasions a spread of dangers, contagion and disease.¹

Difficulty has occurred in practice when more than one application for a permit for burial has been made to the authorities, and a different disposition or place of interment is sought by diverse interests among the representatives of the deceased. The whole subject naturally belongs to the unwritten law, which the courts have always recognized as of and for the public good and public necessity, respecting not only the rights and duty of interment, but also with regard to places of sepulture. It is only incidental to the title of this chapter, but must sometimes be considered in the issue or refusal of permits for burial, or for transportation of bodies. There is a *quasi* property in a dead body, over which the relatives have rights which courts will respect. It is a qualified right to direct the manner of the disposition of the remains, their interment, and to guard or protect the place where the dead are buried.² The right to protect and bury is first in the executors. If there is no testamentary disposition or direction, such right devolves upon the surviving husband or wife. This, however, is not an absolute right, and in granting and controlling the privilege of subsequent removal, the courts will exercise a wise and practical discretion.³

¹ In the State of New York special reference must be had to the requirements of the State Board of Health for a burial and transit permit. And in many of the cities the regulations of the local boards of health are necessary, as sanitary precautions have for a long time been insisted upon in Europe. In the city of New York section 155 of the Sanitary Code must be respected and obeyed as the preliminary condition to bringing any dead body into the city, or its transportation or burial. Every one having any thing to do with it, and every captain, agent or person having charge of or attached to any ferry-boat, sailing or other vessel, or in charge of any car, stage or other vehicle, or public or private conveyance, is controlled by this section of the Sanitary Code. Funerals are also regulated, and under section 204 of the Sanitary Code there shall not be a public or church funeral of any one who has died of a contagious or pestilential disease.

² *Pierce v. Proprietors of Swan Cemetery*, 10 R. I. 227; in the *Matter of Widening Beekman Street*, 4 Bradf. 508; App. *Wynkoop v. Wynkoop*, 42 Pa. St. 298; *Blackman v. Stricker*, N. Y. Superior Ct., Gen. Term, 1st Dep't, Dec., 1892; editorials of N. Y. L. J., Jan. 13, 1893, Jan. 11, 1892; *Moore's Executors v. Moore*, N. J. Chancery, 25 Atl. R. 408; but see *Larson v. Chase*, 50 N. W. R. 288; *Meagher v. Driscoll*, 99 Mass. 281; *Bogert v. City of Indianapolis*, 18 Ind. 134; *Cook v. Waley* (Colo.), 27 Pac. R. 950.

³ See cases cited above, and also *Matter of Secor*, 10 Alb. L. J. 70; N. Y. L. J., Ed. Jan. 13, 1893; *Mitchell v. Thorn*, N. Y. Ct. of Appeals, 32 N. E. R. 10.

On the other hand, a duty of burial may rest upon strangers. For instance, says the N. Y. Court of Common Pleas in *Kipp v. The East River Electric Light Company*, if the person "died upon the defendant's premises, then at common law it would be bound to bury him." Citing the opinion of Lord Denman in *Regina v. Stewart* that: "It should seem that the individual under whose roof a poor person dies is bound to carry the body decently covered to the place of burial. He cannot, therefore, cast him out so as to expose the body to violation, or to offend the feelings or injure the health of the living."

The duty devolving upon parents and kinsmen and householders under these regulations to report births and deaths, and in certain cases the obligation of persons present or having peculiar knowledge or exclusive knowledge of the facts, in the absence of other reports, to inform public authorities; and the duty of persons privileged under the law of the State to solemnize marriages, to report them, have at times been more readily conceded, than the prompt obedience of physicians, ministers and priests to ordinances and laws, requiring them to divulge what, at first sight, may seem professional and privileged information. Fortunately for the need of the State in its care for the public welfare, there is nothing privileged in these *quasi* official reports required from professional men. They are as much a part of their duty as the statement of coroners or judges, and inseparably connected with the offices they perform under the sanction and authority of the State. There is nothing personal in them, and distinctions have been traced not only in criminal cases, but also in the civil, which guard, and prevent the avoidance of, this just and moderate demand, for registers' reports and returns of vital statistics. Contentions on this point, however, are rarely to be found in the regular reports, and in the city of New York they have practically ceased.¹

Every person exercising and enjoying the rights of one of the learned professions, is subject to the conditions ordained for him by the same authority, which confirmed and secured his peculiar privileges and duties. It was only when, under the form of attaching a condition, a State

¹ N. Y. L. J., June 29, 1892, opinion by Mr. Justice Bookstaver, and cases cited, *Regina v. Steward*, 12 A. & E. 773; *Rappelyea v. Russell*, 1 Daly, 214. In this case the defendant as public administrator was held liable for the undertaker's bill. *Chappel v. Cooper*, 13 M. & W. 252.

² On the question of privilege under N. Y. Code, see *People v. Schuyler*, 106 N. Y. 298; *Pierson v. People*, 79 N. Y. 424; *Rosseau v. Bleau*, 131 N. Y. at p. 183; *Hoyt v. Hoyt*, 112 N. Y. 498; *Weston v. Ætna L. I. Co.*, 99 N. Y. 56; 108 N. Y. at p. 580.

attempted to inflict a punishment for a past act not punishable at the time it was committed, that it was restrained. The practice of medicine and surgery was regulated in New York State by the Laws of 1874, and in various functions ministers of the gospel of legally incorporated religious corporations and priests of every denomination were recognized by the law of that State.

In West Virginia it was made a misdemeanor punishable by fine or imprisonment for any one to practice medicine without a certificate from the State Board of Health, and in *Dent v. State of West Virginia* the U. S. Supreme Court held that the law was neither in violation of the Fourteenth Amendment to the Constitution, nor could be justly said to deprive any person of his rights without due process of law. Nothing but indifference or neglect, therefore, was in the way of the enforcement of the rules for the report and record of births, marriages and deaths, and to secure for the public welfare all the advantages, toward which properly framed laws in the light of the experience of the civilized world in this regard since 1874 can be directed.¹ In the matter of marriages however, other legal questions were presented, relative to claims of a right to record an alleged marriage. By the Revised Statutes of New York, as far as validity in law is concerned, marriage continues a civil contract, to which the consent of parties capable in law of contracting shall be essential. It is entirely competent, say the courts, to prove marriages by cohabitation, acknowledgment of the marriage by the parties themselves, common reputation, etc., while it is added, that "presumptions of this kind require to be made with caution and one cannot look through the adjudged cases on this subject without being convinced that the legitimate limits of presumption have too frequently been overlooked. There are many cases in the books which cannot be considered as law and which are condemned by the best commentators."

In 1889, because of certain doubts which had arisen in some cases mentioned below, an amendment was passed as follows: "For the pur-

¹ See *Ex parte Secombe*, 19 How. 9; In the Matter of Cooper, 23 N. Y. 67; 4 Wall. 277, *Ex parte Garland*; see N. Y. Laws 1874, chap. 486; chap. 507, 1890; 2 R. S. chap. 8, tit. 1, art. 1, §§ 8, 9, 10; *Dent v. State of W. Va.*, 129 U. S. 114.

² Evidence of increasing acquiescence in, or possibly rigor in the enforcement of these laws, and of extending influence and use of these returns and statistics, is found in the annual reports of New York, Massachusetts and Michigan State Boards of Health; see Ninth Report N. Y. State Board of Health, pp. 88-89; Tenth Report N. Y. State Board of Health, pp. 267-447; Eleventh Report N. Y. State Board of Health, p. 9 *seq.*

pose of being registered and authenticated, according to the provisions of this title, marriages shall be solemnized only by the following persons:¹

“Ministers of the gospel, or of legally incorporated religious congregations, the leader of the Society for Ethical Culture in the city of New York, and priests of every denomination, mayors, recorders and aldermen of cities, judges of the County Courts, justices of the peace, and justices of the District Courts and police justices in the city of New York, justices and judges of courts of record.”

It was not seen how marriages “solemnized agreeably to the regulations of societies,” but not “for the purpose of being registered and authenticated, according to the provisions of the title,” by the persons therein named, could be received, entered and made a matter of record, so as to furnish the presumptive proof specified.² Returns of such marriages were undoubtedly a part of the vital statistics required, but were not for registry under this law. It followed that some certificates could not be received for record, while the marriages were still susceptible of proof, and might be held valid on the same kind of evidence as the respective certificates purported to give.³

In 1879, in the N. Y. Supreme Court, in the case of *The People on the relation of Wolfgang Kufner*,⁴ against the Health Department, etc., an application for mandamus to record a certificate, made by a notary public, of the acknowledgment and declarations before him of persons uniting in marriage, was denied, and on appeal the decision was affirmed. A recent decision of the Rhode Island Supreme Court has given us the following statement:⁵ “In proof of a ceremonial mar-

¹ 2 R. S., chap. 8, tit. 1, pp. 189-141; *O'Gara v. Eisenlohr*, 88 N. Y. 291, 296-299.

² *Best Presumpt.*, L. & F. 46; *Ransom v. Ransom*, 156 Mass. 78.

³ The distinctive qualification of “ministers of the gospel” and “priests of every denomination,” excluded some officers claiming to be rabbi in incorporated religious societies, who could not be classified as priests, acknowledged of any denomination, and their certificates did not come within the law, with the one exception of the statute, for the leader of the “Society of Ethical Culture.”

⁴ The case was reported in the newspapers of the day, but is not to be found in Hun's Reports.

⁵ *Odd Fellows Ben. A. of R. I. v. Carpenter*, 17 R. I. 720, and see cases cited in the opinion. This case holds that cohabitation for about five months, without proof when it commenced, and that the fact that the man recognized the woman in his will as his wife, are not sufficient proof of their being husband and wife to support a common-law marriage in view of the man's contradictory statements, and of a serious misunderstanding between him and his children from his relations with this woman. In *Fagan v. Fagan*, N. Y. Supreme Court, General Term, July, 1890, Mr. Justice Bartlett re-

riage, the marriage certificate, or record of evidence, or a witness thereof, must be produced."

The general power of a State to control and make exactions of all trades, professions and occupations has recently been passed upon by the Supreme Court of the United States in *Ficklen v. The Taxing District of Shelby County*, and would seem also to cover this subject.¹ The regulation licenses and taxes of occupations are considered in a subsequent chapter.

views New York cases, and decides that cohabitation for twenty years is not sufficient proof of marriage, and adds, "As to the morality of defendant's conduct I have no comments to make, whatever we may think of it, the court cannot properly punish him by adjudging a marriage to exist where there was no marriage in fact."

¹ *Ficklen v. Shelby Tax Dist.*, 145 U. S. 1; *Ex parte Williams*, 20 S. W. R. 583, and cases cited; see chap. XVI.

CHAPTER IX.

OFFENSIVE TRADES AND NUISANCES.

The law of offensive trades and nuisances has been extended and diversified, rather than changed, and remedies, both legal and equitable, have multiplied since the days when all nuisances were comprehended in two classes, public and private.¹ Blackstone reminds the student that common nuisances annoy the whole community in general, and, therefore, are indictable only and not actionable, but he mentions one exception,² "where a private person suffers some extraordinary damage beyond the rest of the king's subjects by a public nuisance, in which case he shall have a private satisfaction by action." Chancellor Kent foreshadows the rise of statutory law on this general subject, in his description of the power of government to interdict such uses of property as would create nuisances, and become dangerous to the lives or health or peace or comfort of the citizens.³ To the list must be added or perhaps included under the word "peace," what in the wisdom of the legislature may be deemed dangerous to the morals of the people,⁴ and even to sound trade. Equity could interfere by injunction where the injury was irremediable, on the principle of the inadequacy of the remedy at common law.⁵

The New York Court of Appeals, in *Health Department v. Purdon*, while sustaining the power of the court to issue an injunction "in case of the exercise of any trade or business which is either illegal or dangerous to human life, detrimental to health or the occasion of great public inconvenience," saying, "it is not only conferred by the provisions of the statute, but belongs to the general powers possessed by

¹ 4 Blackst. Com. 167.

² 3 Blackst. Com. 220; see Sharswood & C. notes.

³ 2 Kent, 840.

⁴ *Mugler v. Kansas*, 123 U. S. 623; *People v. Arensburg*, 105 N. Y. 129; *Comm. v. Huntley*, 156 Mass. 288.

⁵ 2 Kent Com. 840, notes; 3 Ired. Eq. (N. C.) 801; *Attorney-General v. Sheffield Gas Co.*, E. L. & Eq. 639.

courts of equity to prevent irreparable mischief, and obviate dangers, for which no adequate remedy exists at law;" proceeds to quote with approval the language of Chancellor Brougham, in *Earl of Ripon v. Hobart*, regarding the extension of equity powers: "It is always to be borne in mind that the jurisdiction of this court over nuisances by injunction at all is of recent growth, has not till lately been much exercised, and has at various times found great reluctance on the part of the learned judges to use it even in cases where the act or thing complained of was admitted to be directly and immediately hurtful to the complainant."

The development by statute law has been very great.¹ In Indiana, courts have held the common-law nuisance passed by and not existing, and the codes and revisions of laws have elsewhere provided substitutes classifying all offenses, and attempting to regulate every right of action, but in California and in other States, among them New York, statutes giving remedies by action do not take away any common-law remedy in the abatement of nuisances. In general it may be said, the courts, civil, criminal and in equity, have been given larger jurisdiction, and to every suitor wider doors are opened for relief. Some of the old distinctions, doubtless, must be modified. The State legislature may declare a place, business, property or thing, a public nuisance, which is not such, *per se*, or at common law.² A private nuisance is not limited to "hurt or annoyance to the land, tenements and hereditaments of another," and in the light of such cases as *Bohan v. Port Jervis Gas-Light Company*, and *Baltimore and Potomac R. R. v. Fifth Baptist Church*, the difference in result between actions in respect to injuries to property, and respecting acts producing personal discomfort, is lost. Furthermore, there may be the legislative authorization of a nuisance, public or private, of which there are numerous examples.

¹ 99 N. Y. 241, 242; 8 Myl. & Keen, 179; 2 Kent Com. 840, notes.

² *Hackney v. State*, 8 Ind. 494; *Stiles v. Laird*, 5 Cal. 120; *Gould v. City of R.*, 105 N. Y. 49; *People v. Sturtevant*, 9 N. Y. 263; *Henderson v. N. Y. C. R. R.*, 78 N. Y. p. 423, at p. 430; and see 90 N. Y. 122; 112 N. Y. 189-190.

³ *Mugler v. Kansas*, 123 U. S. 623; *Stone v. Mississippi*, 101 U. S. 814; *Bohan v. P. J. G. L. Co.*, 123 N. Y. 18; *Bal. & P. R. R. v. Fifth Bap. Ch.*, 108 U. S. 31; *People v. West*, 106 N. Y. 293. Of legalized nuisances, are purprestures, and structures in the streets, and see the questions discussed in *Atwater v. Trustees*, 124 N. Y. 302, where a coffer-dam was erected in the outlet of a lake and caused the overflow upon plaintiff's land. *Fertilizer Co. v. Hyde Park*, 97 U. S. 670; see *People v. Rosenberg*, 138 N. Y. 410-416, as to prohibition of fat-rendering business within corporate limits, and the "quars." *Douglas v. Com.*, 24 S. W. Rep. 233.

"There is a class of nuisances designated legalized," is the remark of the court in *Fertilizer Company v. Hyde Park*, which added to those declared by statute to be common nuisances *per se*, and to the private nuisances, working not only material, but personal annoyance — perhaps not limited to a single complainant, make with public nuisances at least four classes, merging oftentimes as they are regarded from a different point of view, or spreading out to new relations. Legalized nuisances "rest for their sanction upon the intent of the law under which they are created, the paramount power of the legislature, and the importance of the public benefit and convenience involved on their continuance." Private nuisances, though said to differ in principle from public nuisances in that they are not necessarily founded upon a wrong, and, consequently, cannot be indicted and punished as an offense, may not always maintain this character, as we have seen in the gunpowder cases cited in a previous chapter, or in *Commonwealth v. Kidder*, in Massachusetts, where it was held that a statute authorizing the storage and refining of petroleum "did not justify the manufacture at any place where the necessary consequence was the emission of vapors which constitute a nuisance at common law by their unwholesome and offensive nature." Yet, in a business of a public nature and utility which the State can control and provide for, immunity is not granted for consequential damages sustained by private persons, as would appear by *Bohan v. Port Jervis Gas-Light Company*, and *Baltimore and Potomac R. R. Co. v. Fifth Baptist Church*, above mentioned.

There are qualifications of this power of the legislature.¹ It cannot be used as a cover to withdraw property from the protection of law, or decree the destruction of property used so as to constitute a nuisance merely as a punishment of the wrong, it not being a nuisance *per se*; while the legislative authorization of a nuisance "exempts only from liability to suits, civil or criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large." Yet, acts, as was said in *Lawton v. Steele*, such as are "reasonable inci-

¹ *Lawton v. Steele*, 119 N. Y. 226-239; *Mugler v. Kansas*, 123 U. S. 623; *Stone v. Mississippi*, 101 U. S. 814; *Bal. & Pot. R. R. v. Bap. Ch.*, 108 U. S. 332; *Sinnickson v. Johnson*, 2 Harr. (N. J.) 151; *Comm. v. Kidder*, 107 Mass. 198; *Fish v. Dodge*, 4 Denio, 311. A public hospital for small-pox patients held not to be a "noxious business" under the limitations of a statute. *Eng. Ct. App.*, 68 Law T. R. (N. S.) 337; *Wittington Bd. of H. v. Corporation of Manchester*. An insane asylum not to be prohibited. *Ex parte Whitwell*, Sup. Ct. of Cal., April 1, 1893, 32 Pac. R. 87; *Douglas v. Com.*, 24 S. W. Rep. 233.

² 103 U. S. 332; 123 N. Y. 84; *Hill v. Managers Met. Asylum, L. R.*, 4 Q. B. 433.

dents" of the power exercised under this authority cannot be held to create a nuisance for which the law will afford a redress.¹ "The wants of mankind demand that property be put to many and various uses and employments, and one may have upon his property any kind of lawful business, and so long as it is not a nuisance" (in legal view), he is not responsible to his neighbor for damages unavoidably sustained.

"So long as the use to which he devotes it violates no rights of another, however much damage others may sustain therefrom, his use is lawful and it is *damnum absque injuria*. No immutable and fixed conditions of either rights, or wrongs, or of responsibility are fixed by the statutes. To erect a coffer-dam in the outlet of a lake, obstruct the flow of water and cause it to back upon pasture lands, constitutes both a public nuisance, and so far as the plaintiff is concerned, a private injury; but it was held in *Atwater v. Trustees of the Village of Canandaigua*, that since by statutory authority the time and necessity for the construction of a bridge were matters to be determined by the defendant, and bad faith was not shown, these facts gave no jurisdiction for a review of the discretion exercised. In the *Baptist Church* case it was held that legislative authority to a railroad to bring its tracks, shops and engine-houses into a city did not exempt it from liability for special inconvenience and discomfort not experienced by the public at large, such as the disturbance and annoyance of a congregation worshipping in a church, near to whose doors and approaches the railroad had constructed shops and tracks, where it allowed its engines to stand.²

The manufacture of gas with its attendant odors, offensive to those living near the works, and at all sensitive, if for a private purpose, might be a public nuisance. To afford light, however, for a city, in or near which its gas works must be situated, under regulations by a

¹ 119 N. Y. 240; *Beesman v. P. R. R. Co.*, 50 N. J. L. 285; *Weller v. Snover*, 42 N. J. L. 341; *Williams v. Blackwall*, 2 Hurlst. & Colt. 38; *St. Helens Smelting Co. v. Tipping*, 116 Eng. C. L. R. 608; again, 11 H. L. Cas. 642; *Cooley on Torts*, 598; *Atwater v. Trustees*, 124 N. Y. 602; *Conklin v. N. Y., O. & W. R. R. Co.*, 102 N. Y. 107.

² 122 N. Y. 23-33; *Thurston v. Hancock*, 12 Mass. 222; 124 N. Y. 602; 119 N. Y. 239; *Pennsylvania Coal Co. v. Sanderson*, 118 Pa. St. 126; *Losee v. Buchanan*, 51 N. Y. 477; *Marshall v. Wellwood*, 88 N. J. L. 339. See, however, *Sanderson* case on former appeal, 102 Pa. St. 370; *Pennington v. Brinsop Hall Coal Co.*, L. R., 5 Ch. Div. 769; *Rylands v. Fletcher*, L. R., 8 H. L. 380.

³ *Atwater v. Trustees*, etc., 124 N. Y. 602; 108 U. S. 317.

public law, is a business of a public nature and utility,¹ and as such, in the opinion of the U. S. Supreme Court, in *New Orleans Gas-Light Co. v. Louisiana Light Co.*, cited in *Bohan v. Port Jervis Gas-Light Co.*, the distribution of gas by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which anybody may engage, but is a franchise belonging to the government, to be granted for the accomplishment of public objects to whomsoever and upon what terms it pleases.

Pure air and comfortable enjoyment of property are as much rights belonging to it, as the right of possession and occupancy. These are, however, necessary conditions and they may accompany its use. In the manufacture of gas, the escape of some of it is unavoidable, and it may disturb those who live in the immediate vicinity of the works. This is an inconvenience imposed by the necessities of the people living in large cities and villages, and it has compelled recognition of the rule in *St. Helens Company v. Tipping*, "that each member of the society must submit to annoyances consequent upon the use of property, provided such use is reasonable as respects the owner and those immediately affected in view of time, place and other circumstances."

There can be no longer question that, both in England and this country, statutory authority for public objects and public necessity may divest the character of nuisance from a business or the use of property, and if express and in contemplation of the acts which occasion injury, may afford a complete defense, and again it may stamp the character of nuisance upon otherwise lawful uses, or acts, and erecting a prohibition, enroll violations of its mandate among crimes and misdemeanors. Examples are very numerous in the decisions of courts upon local nuisances, such as dump-boards in the city, a dam, a gas factory, or rendering works, or respecting the slaughtering of animals, hide tanning, or skinning, leather-dressing and lard-boiling establishments, the handling of manure and refuse, the contamination of air or water by factories, and even the pollution of sewers² by emptying or depositing forbidden matter and materials therein.

¹ *St. Helens S. Co. v. Tipping*, 11 H. L. Cas. 642; this same case below, 116 Eng. C. L. R. 608; *Cooley on Torts*, 598; *Atwater v. Trustees*, 124 N. Y. 602; *Harlem Gas Co. v. Mayor*, 83 N. Y. 327, 328.

² In the city of New York by section 89 of the Sanitary Code: "No blood, butchers' offal or garbage, nor any dead animals or stinking animal or vegetable matter, shall be thrown by any person, or allowed to go into any street place, sewer or receiving

Divergent as are the rules applied, they are not confined to complaints and offenses under this head. Of this, a fair illustration is in the *Water Supply* cases in the United States Supreme Court, more opposite in results than the *Slaughter-House* cases,¹ and *Butchers' Union Slaughter-House and Live Stock Landing Company v. Crescent City Live Stock and Slaughter-House Company*, or the *Fertilizer and Gas Companies* decisions, previously referred to. In *Tammany Water-Works v. New Orleans Water-Works* we have *The Rivers* case sustained, and this doctrine "that a legislative grant of an extensive right to supply water to a municipality and its inhabitants, through pipes and mains laid in the public streets, and upon condition of the performance of the service by the grantee, is a franchise vested in the State in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against State legislation, and against provisions in State Constitutions to impair it."

In *Stein v. Bienville Water Supply Company* was the following rule: "A grant, under legislative authority, of an exclusive privilege, for a term of years, of supplying a municipal corporation and its people with water drawn by means of a system of water-works from a particular stream or river, does not prevent the State from granting to other persons the privilege of supplying, during the same period, the same corporation and people with water drawn in like manner from a different stream or river." The opinions reconcile the decisions, by the maintenance of the State authority in the first instance, against a municipal grant which would authorize a new nuisance, however temporary, in tearing up the streets against the faith of a contract completed under a supreme authority. In the second case, although the court finds that a different source of water supply is involved, yet the paramount obligation controlling every engagement is, that the supervision of public health, public morals and public welfare in the legislature is continuing in its nature, can never be bargained away, and these

basin, or into any river or standing or running water or excavation or upon any ground or premises in the built-up portions of said city."

The merging of offenses against police laws into those of an ordinary class of crimes, may be seen in the Penal Code for instance of New York, which makes the pollution of streams by gas, tar, etc., a misdemeanor. Cf. *Rex v. Medley Co.*, 6 C. & P. 292; 1 Russ. Cr. 110; *Hill v. Mayor, etc.*, 139 N. Y. 495; *Bd. of H. v. Copcutt*, 140 N. Y. 12.

¹ 115 U. S. 674; 120 U. S. 64; 141 U. S. 67; 142 U. S. 79.

² 16 Wall. 86; 111 U. S. 746.

proper subjects of governmental power are to be dealt with as the special exigencies of the moment may require.

The Dartmouth College case is thus separated and distinguished, and in *Stone v. Mississippi* the court says: "The power of governing is a trust committed by the people to the government, no part of which can be granted away.¹ The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put." The court adds: "In respect to lotteries there can be no difficulty. They are not, in the legal acceptance of the term, *mala in se*, but, as we have just seen, may properly be made *mala prohibita*. They are a species of gambling, and wrong in their influences. Certainly, the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Any one who accepts a lottery charter, does so with the implied understanding, that the people in their sovereign capacity, and their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter, is a suspension of certain governmental rights in his favor, subject to withdrawal at will." The illustration is useful to us not alone, for this indisputable affirmation of the doctrine that "the legislature cannot bargain away the police power of a State," but incidentally in respect to a class of nuisances, frequently referred to, but now generally regulated by positive and established laws, and, therefore, largely freed from discretion and outside of the present discussion. Such are the bowling alleys, gaming and disorderly house nuisances, many of them nuisances at common law.²

In 1867 the legislature of Mississippi granted a charter to a lottery company for twenty-five years in consideration of a stipulated sum in cash, an annual payment of a further sum, and a percentage of receipts from the sale of tickets. The Constitution adopted in 1868 declared that "the legislature shall never authorize any lottery, nor shall the sale of lottery tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn or tickets therein to be sold." The Attorney-

¹ 4 Wheat. 518, cited and distinguished; 101 U. S. 819-21.

² See 2 Kent Com. 340, notes; *Tanner v. Trustees of Albion*, 5 Hill (N. Y.), 121; 1 Hawk. P. C. chap. 82, H. 6; *Phalen v. Virginia*, 8 How. 168; *Moore v. State*, 48 Miss. 147; *Met. Bd. Excise v. Barrie*, 84 N. Y. 657.

³ *Stone v. Mississippi*, 101 U. S. 814.

General of Mississippi, in 1874, filed an information in the nature of a *quo warranto* against John B. Stone and others, alleging that, without authority or warrant of law, they were then, and for the preceding three months had been carrying on a lottery or gift enterprise within the county named, and the State, under the name of the Mississippi Agricultural, Educational and Manufacturing Aid Society. It was admitted in the pleadings that the respondents had conformed to the provisions of their charter. They were adjudged subject to the constitutional provision and subsequent legislative enactment, and ousted from all liberties, privileges, franchises and emoluments exercised by them, and by nature of their incorporation and charter. The court cites Mr. Justice Grier's opinion in *Phalen v. Virginia* that "experience has shown that the common forms of gambling are comparatively innocuous when placed in comparison with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor and plunders the ignorant and the simple." The court adds: "There is now scarcely a State in the Union where lotteries are tolerated, and Congress has enacted a special statute, the object of which is to close the mails against them."¹

Gambling and all wagering contracts are generally held in this country to be illegal and void as against public policy,² but in England, as the court remarks in *Irwin v. Williar*, they are considered only non-enforceable under the statute and not void at common law, and the prohibitory statutes enacted have been constantly upheld.³ A line of caution, however, has been drawn not only in the English cases, which do not go as far as our own in passing the limits of the common law, but in decisions under the constitutional laws of States where gambling and wagering contracts are expressly prohibited, and such contracts declared void as in *Embrey v. Jemison*, which was an action upon notes

¹ U. S. R. S. 3894; 19 Stat. 90-2, constitutionality sustained; *Ex parte Rapier*, 143 U. S. 110; see *Horner v. U. S.*, 143 U. S. 207, 570; 147 U. S. 449.

² *Irwin v. Williar*, 110 U. S. 499-510; *Reed v. Anderson*, 48 L. T. (N. S.) 74; *Grizewood v. Blane*, 11 C. B. 576; *McLanahan v. Mott*, 25 N. Y. Supp. 892.

³ *Pearce v. Rice*, 142 U. S. 28; *People v. Noelke*, 94 N. Y. 137; *Wilkeson v. Gill*, 74 N. Y. 63; N. Y. Penal Code, 323; *West v. Carter*, 129 Ill. 349; *Embrey v. Jemison*, 131 U. S. 386. Money paid in settlement of lost bets, upon request of losers, cannot be recovered. *Tatam v. Reeve*, 67 Q. B. Division, Nov. 3 1892, S. C., L. T. R. (N. S.) 688.

dated and payable in New York, but discussed as of a contract made in Virginia, and held to be void under the law of either State.

In the State of New York in *The Matter of Jacobs*, and of *People v. Gillson*, it was held that the rights of property may not be invaded under the guise of a police regulation for the protection of health,¹ and that it is within the province of the court to determine whether the act is violative of constitutional guaranties. In the *Gillson* case the provision of the Penal Code prohibiting the sale or disposal of any article of food on the inducement that any thing else will be delivered as a gift, prize, premium or reward is declared to be unconstitutional and void. In *Thacker v. Hardy*, *Roundtree v. Smith*, and *Burns v. Scott*, no conclusions or presumptions of the illegality of the transactions between the parties were entertained, not established by the evidence.² In no other respect has the police power been circumscribed by these decisions, but its restrictive force, when exercised by municipal and village authority, has been maintained.³

In *McLanahan v. Mott* and the *North River Bridge Co.*, in the Supreme Court of New York, the most recent guise and form of a lottery scheme has been discussed. The action was for an injunction to restrain the sale and redemption of bonds of the Bridge Company to an enormous amount, maturing four centuries later, bearing interest, and to be paid off as drawn by lot at "maturity value." The complaint alleged that the directors threatened to attach this interpretation by supplemental agreement to the deed of trust if necessary to make the bonds salable, and that the plan "is contrary to public policy, an abuse of the corporate powers of the defendant company, and contrary to the statutes of the State of New York, in being a lottery scheme." A demurrer was sustained in the court below, but overruled on appeal and judgment directed as prayed for. The plan attacked by the suit was that: "A sinking fund shall be created and maintained for the gradual payment and redemption of bonds hereby secured. It shall consist of, and be maintained by a payment of the said company to the

¹ 98 N. Y. 98; 109 N. Y. 339; 119 N. Y. 239; 1 Gray, 1; 12 Gray, 89.

² *Thacker v. Hardy*, 4 Q. B. D. 685; *Roundtree v. Smith*, 108 U. S. 267; *Burns v. Scott*, 117 U. S. 582.

³ In *Conley v. Christensen*, 187 U. S. 86, an ordinance of the city of San Francisco was sustained, and it was held that there is no inherent right in a citizen to sell intoxicating liquor at retail. And in *Village of Carthage v. Frederick*, 122 N. Y. 268, the infliction of a penalty upon the defendant pursuant to a village ordinance for allowing snow to collect and remain in front of his premises after ten o'clock in the day was upheld.

said trustee, before each interest day, of \$400,000, together with an additional sum of money equal to the semi-annual interest, at two per centum, on the total number of bonds previously redeemed and canceled, as herein provided, and the said trustee shall, at least one month prior to each interest day, designate by lot as many bonds for redemption at their maturity value as the moneys in said sinking fund on such interest day will suffice to pay, and said bonds, so designated, shall, on such interest day, be redeemed and paid at their maturity value." It also contemplated that the words "maturity value" should signify that on each \$100 bond paid before maturity, there shall be paid the sum of \$1,000, the four hundred and fifty annual interest items at two per cent from July, 1893, to July 1, 2313, A. D., being added to the principal sum of \$100. Mr. Justice Patterson, in the opinion of the court, says: "It does not require much analyzing to ascertain that the plan is one which seeks to unite, in a very ingenious manner, investment with what is wonderfully like gambling. * * * It is perfectly obvious that the redemption feature is the real and only attraction connected with the scheme, and that the inducement offered is the chance of holding lucky numbers and receiving, in a determination to be made by lot, \$1,000 for \$100, possibly in six months or a year, or, in other words, that the holder of one bond may, by mere chance, get in six months what would not be realized by another in four hundred and fifty years. That this scheme is a lottery; that to the mere decision of chance is to be left what bonds shall be retired at the enormous increase contemplated, is as plain as if the loudest proclamation were made of it. * * * The redemption feature which holds out the hope to a purchaser of speedily obtaining tenfold for his outlay, and as it were by the turn of a wheel, of the casting of lots is the real attraction. * * * It is the chance of winning at an early drawing ten times the face value of a bond that constitutes illegality, if there is any illegality in the scheme."

One principle remains constant, as was stated by Chancellor Kent, "that private interests must be made subservient to the general interests of the community." These interests will be viewed and judged in the light of surrounding circumstances of time and place, not only as they originated, but as they are maintained.¹ What would be tolerated at one

¹ Slaughter-House cases, 16 Wall. 33; Butchers' Union v. Crescent City Co., 111 U. S. 746; N. Orleans Gas Co. v. Louisiana L. Co., 115 U. S. 650; Fertilizing Co. v. Hyde Park, 97 U. S. 699; Crowley v. Christensen, 137 U. S. 86; Bal. & Pot. R. R. Co. v. Fifth Dep. Ch., 108 U. S. 317; Fish v. Dodge, 4 Denio, 811; Crump v. Lam-

time or locality would not be in another, and negligence may exist both in construction and in management and operation. In proper and distinguishable cases, relief may be granted to private citizens, in damages for any special inconvenience and discomfort, not experienced by the public at large, but instances must always remain of injury and annoyance, for which the law affords no redress. Mr. Justice Field's remark, in *Butchers' Union Company v. Crescent City Co.*, that "The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike, upon the same conditions," is not inconsistent with that of Mr. Justice Swayne, in *Fertilizing Company v. Hyde Park*, followed in the U. S. Supreme Court, and is in accordance with the citation from the opinion of the New York Supreme Court, in *Coates v. Mayor*, etc., that "Every right from absolute ownership in property down to a mere easement is purchased and holden, subject to the restrictions that it shall be exercised so as not to injure others. Though, at the time, it be remote and inoffensive, the purchaser is bound to know at his peril, that it may become otherwise by the residence of many people in its vicinity, and it must yield to by-laws and other regular remedies." But public interests may make still further demands, and for public purposes or necessity, make lawful, and thus afford immunity for, an act or thing otherwise a nuisance.

Public nuisances are those which come under the control of Police Powers. Public interests must be involved to justify the direct interference of the public authority, and this is equally true of both legislation and legal action, and embraces legalized, as well as statutory nuisances. In *Lawton v. Steele*, the court criticises the statement of a recent writer, that nuisances arise from the violation of the common law, and not from the violation of a public statute, for the reason that "the principle stated has no application, where the statute itself prescribes that a particular act, or the property used for a noxious purpose shall be deemed a nuisance." Again the court says: "We know of no limitation of legislative power, which precludes the legislature from enlarging the category of public nuisances. There are, of course, limitations upon the exercise of this power." Nothing else but the supe-

bert, L. R., 3 Eq. 209; *Bohan v. Port Jervis G. L. Co.*, 122 N. Y. 18; *Rex v. White*, 1 Burr. 337; *Rockwood v. Wilson*, 11 Cush. 221; *Beseman v. P. R. R. Co.*, 50 N. J. L. 235; *St. Helens Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Carhart v. A. G. L. Co.*, 22 Barb. 297; *Coates v. Mayor*, etc., 7 Cow., 585; 2 Kent Com. 340.

rior interests of, and the care for, the public welfare, can justify the "legalized nuisance," so called.

The elevated roads in the streets, a dam at the outlet of a lake, by which private lands are flooded, a gas-house, railroad, an engine-house in the neighborhood, or the destruction of property, are invasions of rights, as we have before seen, which must be satisfied or adjudicated if brought in question. It may be that a private nuisance, which is ordinarily remitted, as Blackstone has it, to the field of private actions, takes on somewhat of a public character and requires supervision as of a different class. This may happen in a city with chimney smoke and other house annoyances.

It is an actionable nuisance to build one's chimney so low as to cause the smoke to enter his neighbor's house, and it is no answer that the city regulations of height for chimneys has been complied with.¹ But if the neighboring building, thus invaded, is an office building, containing many, perhaps hundreds of occupants, and air and ventilation, such as they have a right to enjoy, although they are not on their own premises, are shut off, the nuisance has a public character.² A private sewer may endanger more houses than one, and affect a neighborhood. A well or private stream may occasion a public peril, as that by typhoid fever. Such instances in New York city have been made amenable to public control by the action of the Health Department. Besides this natural accretion of importance and qualified change through surrounding circumstances, in other ways private nuisances may acquire a public form. The legislature, having control of a subject, may by definitions in a statute regulate its material and essential details so as to guide the enforcement of the law upon conditions which otherwise would escape public regulation. Thus in tenement and lodging-house laws, the many provisions respecting air, light, ventilation and drainage, sleeping rooms, cellars and leaking roofs. The Mining and Factory Laws of England and the American States and the regulations fixed for what are elsewhere called "injurious," and in our country are

¹ 108 U. S. 384; *Sampson v. Smith*, 8 Sim. 271; *Whitney v. Bartholomew*, 21 Conn. 212; 2 Story Eq. Jur., §§ 921-926.

² In *State v. Purse*, 4 McCord, 472, it was held that a house kept in a filthy and negligent condition is a public nuisance, because it endangers the public health and safety; see, also, U. S. v. Hart, Pet. C. C. (U. S.) 390; *State v. Harrison*, 23 Texas, 238; *Comm. v. Mann*, 4 Gray, 213; *Wood on Nuisances*, 34-35; see, also, chap. III, as to the Factory Acts. The regulation of a mine or a workshop is of the same character, and see an interesting paper in *Fortnightly Review*, February, 1893, by Vaughan Nash, on "The Home Office and Deadly Trades."

termed "offensive" trades and for occupations in which have been found great abuses, as in the "sweated industries," make the conditions of the contract between the employer and the employee, which the State insists upon, because of public interest. A limited class only may be concerned, as for example women, or children, tailors, seamstresses, or match-box makers or in dangerous occupations, such as scouring china, steel polishing, laborers in white lead and alkali works and in mines.

Since 1883, in the administration of a special act for the white lead trade in England, through the Home Secretary Department, minute directions for head and body coverings, respirators, baths and acidulated drinks for those employed in this business, have been insisted upon by the State. In France and Germany the government at once intervenes when shown that any manufacturing process is attended with disease and increasing mortality and seeks after careful investigation to impose remedial measures. The English Home Secretary has recently "scheduled" nitro-benzole as "dangerous in manufacture," and a recent writer has noticed appeals that match-making, copper and brass, zinc and lead works, japanning, arsenious acids, aniline dyes and industries where mercury is used, should be added to the "poisonous trades" which have special conditions fixed for them by rules or by law. In the health laws manifold requirements are impressed upon private property and private citizens.

The law of New York State defines and declares,¹ "whatever is dangerous to human life or detrimental to health; whatever building, or erection, or part, or cellar, is overcrowded with occupants, or is not provided with adequate ingress and egress to and from the same, or the apartments thereof, or is not sufficiently supported, ventilated, sewerred, drained, cleaned or lighted, in reference to their or its intended or actual use; and whatever renders the air or human food or drink unwholesome, are also, severally, in contemplation of this act, nuisances, and all such nuisances are hereby declared illegal." Another process still, and one of exclusive and imperious power, is vested in boards of public officers, to consider and declare places, acts and things, public nuisances, and to deal with them accordingly.

In the city of New York, the Board of Health, "whenever any building, erection, excavation, premises, business pursuit, matter or thing, or the sewerage, drainage or ventilation thereof in said city,

¹ N. Y. L. 1867, chap. 956, § 5; N. Y. Cons. Act, 1882, §§ 535, 636; id., § 659. In *People, ex rel. Copcutt, v. Bd. of Health of Yonkers*, 140 N. Y. 1, it is held that the determination of the Board of Health of Yonkers that a nuisance exists is not conclusive, but the action of the Board is not reviewable on *certiorari*.

shall, in the opinion of said board (whether as a whole or in any particular) be in a condition or in effect dangerous to life or health, said board may take and file among its records, what it shall regard as sufficient proof to authorize its declaration that the same, to the extent it may specify, is a public nuisance, or dangerous to life and health, and said board may thereupon enter in its records the same as a nuisance, and order the same to be removed, abated, suspended, altered, or otherwise improved or purified, as said order shall specify." A hearing is to be afforded to the parties interested, and facts and proofs may be presented "according to the rules and directions of said board;" the board shall enter such facts and proof as it may require; and thereafter may rescind, modify or reaffirm its said declaration or order, and require execution of said original, or of a new and modified order, to be made in such form and effect as it may finally determine." In cases where no hearing is asked for, "the order shall not be altered so as to render it more burdensome."

Administrative and *quasi* legislative or judicial powers, delegated to this body, are united with executive functions, and have stood the test of legal decisions and review. By the same law the Board of Health may execute its orders through its own officers, or persons and means, to be engaged by the said Board of Health." It is furthermore made the duty of the Board of Police and its officers and men, to faithfully enforce and execute the orders of the said Board of Health, made pursuant to its powers, and duly authenticated as said Board of Health may direct. A reference to the official reports of this board will show that buildings have been torn down, vessels removed, gas companies regulated or stopped, houses vacated, markets renovated and repairs compelled by its order, with like effect as though each nuisance it has declared and prosecuted, was originally a common nuisance, and to the hurt and endangering of the whole community.¹ State Boards of Health have somewhat similar powers, though generally limited in the execution of their orders. In the State of New York, "the Governor may, in relation to matters or things found and certified by the State Board of Health to be nuisances, declare them to be public nuisances, and order them changed, as he may direct, or abated and removed.

¹ Met. Bd. of H. v. Helster, 87 N. Y. 661; H. D. v. Knoll, 70 N. Y. 585; Polinsky v. People, 78 N. Y. 65; Health Dept. v. O'Reilly, 49 Super. Ct. 524; N. Y. Sup. Ct., 1st Dept., in Fulton and Washington Market cases, and N. Y. Fertilizing Company case, August, 1878; see Report of N. Y. Board of Health, 1878, pp. 20, 21, 38-35.

Any violation of such an order shall be held and punished as a misdemeanor.¹

The same governmental functions are discharged under the highly centralized system of England by the Home Secretary, and under him by the chief inspector of factories. He has not been inaptly called the "lord protector of those who toil and spin" and wear out bodily strength and lives in workshops and mines. Under section 8 of the Factory Act, "whenever the Secretary of State certifies that, in his opinion, any machinery or process or a particular description of manual labor used in a factory or workshop other than a domestic workshop is dangerous or injurious to health, or dangerous to life or limb, either generally or in the case of women, children or any other class of persons, or that the admission of fresh air is not sufficient, or that the quantity of dust generated or inhaled in any factory or workshop is dangerous or injurious to health, the chief inspector may serve on the occupier of the factory or workshop a notice in writing, either proposing such special rules or requiring the adoption of such special measures as appear to the chief inspector to be reasonably practicable and to meet the necessities of the case."

Fifty works of the United Alkali Company, especially at Widnes, have under this act been scheduled as "dangerous and unhealthy." White-lead works have for years been under similar regulations, and lately nitro-benzole has been added to the schedule, and prosecutions for violations of rules or measures adopted may follow.

"The acknowledged police power of a State extends often to the destruction of property." A nuisance may be abated. "Every thing prejudicial to the health or morals of a city may be removed," is said by Mr. Justice McLean in the License cases. Mr. Justice Andrews, in *Lawton v. Steele*, commenting upon the decisions respecting the law of abatement, says "they show that the public remedy is not in all cases confined to a judicial prosecution." "As the legislature may declare nuisances, it may also, where the nuisance is physical and tangible, direct its summary abatement by executive officers without the intervention of judicial proceedings in cases analogous to those where the remedy by summary abatement existed at common law." He further instances "nuisances arising from conduct which can only be abated by the arrest

¹ N. Y. L. 1880, chap. 822, § 8.

² 5 How. 89; *Hart v. Mayor*, 9 Wend. 590; *Van Wormer v. Mayor*, 15 Wend. 263; *Meeker v. Van Rensselaer*, id. 397; 119 N. Y. 286.

and punishment of the offender." In *Hart v. Mayor* a question was raised as to the validity of a city ordinance, and the court held the ordinance void, as not within the power conferred by the charter, but that the common-law right of abatement of the nuisance in question existed, although its removal involved a destruction of property. In *Van Wornner v. Mayor* the Board of Health of the city of Albany adjudged certain premises to be a nuisance, and an ordinance of the corporation was thereupon passed directing its abatement. In an action of trespass, brought for the acts of an agent in carrying the ordinance into effect, it was held "that the plaintiff was not at liberty to show that the nuisance did not in fact exist at the time of the adjudication; and, also, it was not competent for him to show any irregularity or non-compliance on the part of the Board of Health with the requirements of the statutes in such cases."

In *Meeker v. Van Rensselaer*, in the Supreme Court of New York, in 1833, the declaration charged the defendant with pulling down five dwelling-houses in the city of Albany during the summer of 1832 while the Asiatic cholera prevailed. The defendant was a resident and alderman in the district where the premises were situated. Objections made to proof received by parol of the order of the Board of Health were held on appeal to be well taken, but the evidence was considered not material, "because the defendant did not need any authority from the Board of Health. As a citizen of the ward who desired to preserve the public health, and especially as an alderman, he was fully justified in every act done." Evidence had been received that the premises were a nuisance which could be abated in no other way than that resorted to, and evidence had been excluded of other buildings in the city similarly situated, which rulings were approved, and a verdict for the defendant was sustained.

In *Renwick v. Morris* no prescription by twenty years' endurance of the nuisance was allowed as a defense, and the distinction was marked which has been repeatedly declared, that, while "the right of abating or indicting a public nuisance is not affected by a statute imposing a penalty for the offense, unless negative words are added evincing an intent to exclude common-law remedies;" yet, "where a new offense is created by statute, and a penalty provided for it, no other punishment can be imposed; and where a new right is given by statute, and a remedy provided for the violation of it, the party is confined to this remedy." The Court of Errors held that the

length of time which this public nuisance had been continued did not legalize it, for the continuance was of itself an offense.¹

Telegraph poles were sought to be maintained in the streets of cities on various grounds, under State and United States statutes, and under provisions of the Constitution, not alone relating to interstate commerce, as they were parts of lines of communication, but also because the telegraph companies claimed rights under the Fourteenth Amendment, and further had the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain and along any military or post roads of the United States, and over, under or across navigable streams so as not to obstruct ordinary travel or navigation. In the State of New York, in 1848, and again in 1853, they were allowed to erect and construct the necessary fixtures for lines of telegraph upon, over or under streets and highways, but in 1884-1886 legislation followed, under which they were required to remove the poles and place the wires in the subways which had been constructed. Having refused to comply, the Commissioner of Public Works caused the poles to be cut down and the wires removed, and an injunction was sought on all these grounds, but refused. The Court of Appeals of New York held that the plaintiff had no right, after notice to remove, to maintain its poles and wires above the surface of the streets, and that they became a nuisance which the public officials had the right to abate; that the previous grants were general public legislative acts in the exercise of the police powers of the State, and, therefore, they were not beyond the reach or touch of further legislation; that the scope and range of the United States laws, relative to them, within a State, cannot be easily defined, but that under them no telegraph company could interfere with streets and highways in the State, so as materially to impair their usefulness as ordinary highways. "Nor could these congressional acts deprive the State of its control over its highways and its right to regulate their use under the police power for the public welfare."

¹ *Renwick v. Morris*, 7 Hill, 575; *King v. Montague*, 4 Barn. & Cres. 598; *Folkes v. Chad*, 8 Doug. 340. As to *laches*, see *McKeon v. See*, 51 N. Y. 800, and *State v. Holman* (N. C.), 10 S. E. R. 758. As to remedies, *Sedg. Stat. and Const. Law*, p. 98, 577, note; *Thompson v. N. Y. & Harlem R. R. Co.*, 8 Sandf. Ch. 625.

² *Am. Rapid Tel. Co. v. Jacob Hess*, 125 N. Y. 651; *People v. Squire*, 107 N. Y. 593; *New York v. Squire*, 14 Daly, 154; affirmed, U. S. Sup. Ct., 145 U. S. 175; *West. U. Tel. Co. v. Attorney-General*, 125 U. S. 530; *Douglas v. Com.*, 24 S. W. Rep. 233; *West. U. Tel. Co. v. Mayor*, U. S. Circuit, N. Y., *Wallace, J.*: The business of the company was, however, held to be interstate commerce and free from tax, in *Leloup*

Not alone the facts, but the legislation occasioned by them, changed this encroachment upon common rights from a lawful to an unlawful character, but at no time could there have been a defense against unsound and dangerous poles or apparatus which would, if involving dangers extraneous to their purpose, become nuisances *per se*. It was said in *U. S. Illuminating Gas Company v. Grant*¹ that uninsulated wires constitute a public nuisance which the commissioner of public works, both as a private citizen and as a public official, charged by the duties of his office with the removal of obstructions from the streets may abate. It was further held that as it was the duty of the company owning and using electric wires to maintain a proper inspection of apparatus which may become dangerous, and to remedy all defects immediately, it was not entitled to notice of defects, nor to be heard as to their existence, nor to any delay, in order that they may remedy the same before the city authorities proceed to abate such a nuisance. This was evidently upon the ground that a public danger was to be provided for, and the questions were relative to a nuisance *per se*.

A distinction has, however, been drawn in a recent case between permanent obstructions in public streets authorized by a municipal corporation for a public or for a private purpose, and the court says that in the latter case the structure may be or become a public nuisance and liable to abatement as such, yet it cannot be held a nuisance *per se*; on the other hand that cannot be called a public nuisance which is maintained by public authority. Therefore, that water tanks constructed in the streets of Salem, Oregon, for the use or purpose of sprinkling the streets, under a license or grant from the municipality, were not nuisances *per se* and could not be abated as such. Nor could the license be revoked until they have in fact, or in use, become an actual nuisance. The facts having been found in favor of the plaintiff, it was held that the city must respond in damages, for having removed the tanks. The distinction fails as soon as the unlawful character appears, for an actual and immediately dangerous nuisance injurious to the public welfare is never maintained by public authority. As was said in *Commonwealth v. Kidder*, so in respect to any grant or franchise under public authority, "the reasonable, if not necessary,

v. Mobile, 127 U. S. 640; see further, *Paterson v. Grundy*, 26 Atl. R. 788; *D., L. & W. R. R. Co. v. N. Pass. R. R. Co.*, 16 N. J. L. J. 248; *Taggart v. Newport St. Ry. Co.*, 16 R. I. 668; *Detroit City Ry. Co. v. Mills*, 85 Mich. 684; *Lockhart v. Craig St. Ry. Co.*, 189 Pa. St. 439; *Keasby El. Wires in Streets*, chap. 2.

¹ *United States Illuminating Co. v. Grant*, 7 N. Y. Supp. 788.

inference is, that it was not the intention of the legislature to establish a new rule, but to leave the question (whether the manufacturing is carried on in such a place and in such a manner as to be unwholesome and offensive to the public, and on that account indictable as a nuisance) to be determined by the rules of common law."¹

In New York and Philadelphia unsound telegraph poles had been found a menace to public safety, and a common nuisance, and the city of Philadelphia passed an ordinance reciting the inconveniences from the poles, declaring inspection of them necessary, and requiring license fees to be paid.

This ordinance was held valid in Pennsylvania, and police regulations over the telegraphic lines were sustained. Finally suit was brought in the Supreme Court of the State of New York to recover license fees due to the city of Philadelphia and the plaintiff had judgment, which was sustained on appeal.²

Where a doubt may exist the courts have, at times, insisted upon their judgment of the facts, and even occasionally required proof of actual injury done, disregarding declarations of nuisance by law or ordinance, where the hurt or annoyance was prospective, or only a tendency to injury was in evidence. The Passaic River Water cases cited in the preceding (seventh) chapter, are to this effect. In Wisconsin the court recently held a law to be unconstitutional, and "to usurp judicial powers," because it declared the driving piles in certain parts of Rock river a presumptive nuisance and ordered it enjoined without proof.³ This case was considered and approved in the Supreme Court of Michigan in *City of Grand Rapids v. Powers*, wherein an ordinance fixing an arbitrary dock line in a navigable river, in the bed of which (by the law of Michigan), the riparian owners have absolute property subject

¹ *Savage v. City of Salem*, Sup. Ct., Oregon, Jan. 9, 1893, 81 Pac. R. 882; *Harris v. Thompson*, 9 Barb. 850; *Com. v. City of Boston*, 97 Mass. 55; *West v. Bancroft*, 32 Vt. 371; *Hadsen Tel. Co. v. Jersey City*, 49 N. J. L. 808; *Com. v. Kidder*, 107 Mass. 188; *Hill v. Managers Met. Asy., Dist., L. R.*, 4 Q. B. 483; *Eames v. N. E. W. Co.*, 11 Metc. 570.

² *City of Phila. v. Postal Tel. Co.*, 67 Hun. 21; 21 N. Y. Supp. 556; *Telegraph Co. v. City of Phila.*, 12 Atl. R. 144; *City of Chester v. Tel. Co.*, 28 Atl. R. 1070; *City of Phila. Tel. Co.*, 2 Wkly. Not. 455; *R. R. Co. v. Phila.*, 47 Pa. St. 821; *Newark Aq. Bd. v. Passaic*, 45 N. J. E. 398; *State, ex rel. Board of Health, v. The Board of Chosen Freeholders of the County of Bergen*, 46 N. J. Eq. 178; and see the rule that the common council cannot declare a thing a nuisance, 89 N. J. E. 122; see, further, 9 C. E. Green, 169; 29 N. J. L. 170; *Board of Health and Vital Statistics v. N. Y. Horse Manure Co. (N. J.)*, 19 Atl. R. 1098.

³ *Janésville v. Carpenter*, 46 N. W. R. 123; 77 Wis. 268; *Hill v. Mayor, etc., N. Y.*, 139 N. Y. 495.

only to the public rights of navigation, was held unconstitutional and it was said that the building of a wall into the stream cannot be enjoined in the absence of evidence that it will be a nuisance, or injure any public or private interest. The opinion further declares that the legislature of Michigan cannot authorize a municipality to make that a purpresture or nuisance which is not so in fact, if, by so doing, the constitutional "rights of any citizen in person or property are destroyed." This difference in the ownership of the bed of the river is the foundation upon which this court distinguishes the Grand Rapids case from similar ones in other States than Wisconsin, and especially Connecticut, Massachusetts and New York cases, and the court limits any opposing rule, such as that quoted from the treatises on the subject of constitutional limitations to wharves and harbors upon navigable waters for the purposes of navigation by boats and vessels. Thus it has been said, "wharf lines may be established for the general good, even though they prevent the owners of water fronts from building out on the soil which constitutes private property;" and, also, it is competent for the legislature to pass acts establishing harbor and dock lines, and to take away the rights of proprietors to build wharves on their own lands beyond the lines, even when such lines would be no actual injury to navigation."¹

In *People v. Vanderbilt*, the sinking of a crib or pier outside of the line established by the legislature, although under authority of a resolution of the common council of New York, was held to be a purpresture and a nuisance. The authority cited, in its support of the opinion of Mr. Justice Miller in the United States Supreme Court in *Yates v. Milwaukee*, also depends upon the construction of the laws of Wisconsin, in view of this riparian right asserted in the decisions of her courts, and it is not found that *Yates* dock projected beyond the established lines. The decision, however, goes further and brings to view another principle affecting municipal, as distinguished from State authority. The reason is given as follows: "A Statute of a state, which confers on a city the power to establish dock and wharf lines, and to restrain encroachments and prevent obstructions to such a stream, does not authorize it to declare, by special ordinance, a private wharf to be an obstruction to navigation and a nuisance, and to order its removal, when in point of fact it was no obstruction or hindrance to navigation. The

¹ *People v. Vanderbilt*, 26 N. Y. 287; see 116 N. Y. 889; 92 N. Y. 478-485; *State v. Sargent*, 45 Conn. 858; *Com. v. Alger*, 7 Cush. 58; *Cooley Const. Lim.* 739; *Dill. Mun. Corp.*, § 107.

question of nuisance or obstruction must be determined by general and fixed laws, and it is not to be tolerated that the local municipal authorities of a city declare any particular business or structure a nuisance in such a summary way and enforce their decisions at their own pleasure."

Mr. Justice Barrett, in his opinion in the Electric Light cases, in the Supreme Court, General Term, in New York, in December, 1889, cites the rule limiting the discretionary power of the municipal authorities, and says: "There is another principle which should be conceded with equal freedom, and that is that the corporate authorities cannot, by their declaration, make that a nuisance which, in fact, is not." Judge Dillon expresses the rule more broadly: "Where the thing sought to be abated is intrinsically, and inevitably, a nuisance, the authority to preserve the health and safety of the inhabitants and their property is a sufficient foundation for ordinances suppressing and prohibiting it. Much must be left to the discretion of municipal authorities, and their acts will not be interfered with, unless they are manifestly unreasonable and offensive, or unwarrantably invade private rights or clearly transcend the powers granted to them." This discrimination was used by the Supreme Court of the State of New York, on an appeal from the County Court, in an action to recover a penalty imposed by an ordinance of the city of Rochester, requiring that "every owner or occupant of a stone quarry shall either cause the same to be filled up level with the ground, or the water therein to be drained and the quarry kept dry." The General Term held that the ordinance was intended for the abatement of nuisances dangerous to the public health and, therefore, did not apply.

It was shown that a pond existing for forty years in an abandoned quarry was fed by a spring containing fish and was used as an ice-pond, but in the summer sometimes emitted an unpleasant odor; that a green scum gathered at the edge, and dead animals were frequently thrown into it, while, when the water was at a certain height, it soaked into neighboring cellars. This decision was reversed by the Court of Appeals, returning to the settled law that a municipal corporation

¹ *Yates v. Milwaukee*, 10 Wall. 498; see this case distinguished and sovereignty over lands under navigable waters in the State maintained, U. S. Supreme Court, Dec. 5, 1892, *Illinois Central R. R. v. State of Illinois*; *City of Chicago v. Illinois Central R. R.*, 146 U. S. 387.

² 1 Mun. Corp. 379.

³ *City of Rochester v. Simpson*, 10 N. Y. Supp. 499, and 184 N. Y. 414; *Babcock v. City of Buffalo*, 56 N. Y. 268; 94 N. Y. at p. 508.

possesses the powers incident to those specifically conferred; that the ordinance was valid, and the evidence justified a verdict against the defendant. A somewhat divergent view prevailed in an earlier case respecting an ordinance of the city of Buffalo, under which the sanitary committee of the common council had determined that a canal, called Prime Slip, was unwholesome and a nuisance because of the stagnant water and filth therein, and ordered it filled up. It was held, both at General Term and the Court of Appeals, that the filling up of the canal was not a proper exercise of the power to abate nuisances. The same doubt is intimated in *Matter of Application of Paul*, where the relator was ordered discharged from arrest for the crime of manufacturing cigars and preparing tobacco in a tenement-house in the city of New York, contrary to the law of 1883 forbidding this practice, and the court says, the argument is very "grave and serious upon the question whether the act, as a whole, is within the police power of the State and capable of being sustained under the Constitution."

These, however, are exceptional cases, and as we have noticed in preceding references, in most instances, the nuisance is clearly defined, the jurisdiction undoubted, and the principal question is, whether there has been an intentional violation of the law. Only so far are the issues of scienter, and a tendency to injury involved, the forbidden act or thing having by legal operation become *malum prohibitum*.¹ As the court has said in *People v. West*, "A legislative act is presumptively valid," and, again, "It is the province of the legislature to determine in the interest of the public what shall be permitted or forbidden, and the statutes contain very many instances of acts prohibited, the criminality of which consists solely in the fact they are prohibited, and not at all in their intrinsic quality."

In England the definition of nuisance from the Public Health Acts has been enforced in the courts, as, in our country, those of our health laws have been maintained. We read in *Stephens' Digest of Criminal Law* that "Every thing is deemed to endanger public health, life or property which, in either case, is actually dangerous thereto, or which must be so in the absence of prudence and care, the continued exercise of

¹ *People v. Gardner*, 62 N. Y. 299; *People v. West*, 106 N. Y. 295-6; see definitions, N. Y. L., § 6, chap. 956, 1887; § 636, N. Y. Cons. Act of 1882; chap. 908, 1867; chap. 504, 1879; opinion of Mr. Justice Freedman, N. Y. Superior Court, *Health Dept. v. O'Reilly*, 49 Super. Ct. 524; *Mugler v. Kansas*, 123 U. S. 623; *Phelps v. Racey*, 60 N. Y. 14; *Com. v. Nagle*, Sup. J. Ct., Mass., Jan. 4, 1893; evidence of good reputation excluded in actions for *mala prohibita*, 82 N. E. R. 861.

which cannot reasonably be expected.' An illustration is given of the storage in a warehouse in London of a large quantity of a mixture of wine and wood naphtha, a substance more inflammable than gunpowder, and of such a nature that a fire lighted by it would be practically unquenchable. It was held that the defendant in such a case commits a common nuisance, though he uses the most scrupulous care to avoid accidents.

In *Hart v. Mayor*, Mr. Justice Sutherland said, that the right to abate the nuisance did not depend upon the validity of the ordinance considered as a legislative act, but the real question was, "whether the corporation had power, upon any principle whatever, to do the act which the ordinance authorized to be done." In the *Electric Light cases*, in the city of New York, the municipal authority was sustained from both points of view, that of the State law, and that of the common right to abate a public nuisance. Mr. Justice Barrett in these cases divides the question and says: "While the entire system may not be a nuisance, each part of it, which is suffered to become dangerous, is a nuisance, and a nuisance of the highest kind." With such distinctions carefully drawn the apprehended difficulty from local prejudice, or tyrannical acts of a city government, suggested by Mr. Justice Miller's opinion, in *Yates v. Milwaukee*, is obviated.

It is sufficient to constitute a nuisance, if it be dangerous, or unwholesome, or produces that which is offensive to the senses,¹ and which renders the enjoyment of life and property uncomfortable, is the opinion of Lord Mansfield, in *Rex v. White*, and this rule has been generally followed in England. In *Dennis v. Eckhardt* there is an observation by the court, that a chancellor does not wait until noisome trades and unwholesome gases kill somebody before he proceeds to restrain. Chancellor Walworth, in *Catlin v. Valentine*, adopts almost the same language, and says it is not necessary, to constitute a nuisance, that the noxious trade or business should endanger the health of the neighborhood. The statement of Mr. Justice McLean, in the *License cases*, that "every thing prejudicial to the health or morals of the city may be removed,"²

¹ Stephens' Dig. Cr. L. Act, 187; *Case of Lister*, 1 D. & B. C. C. 209.

² 9 Wend. 571; *Brush Electric Ill. Co. v. Grant*, 7 N. Y. Supp. 788.

³ *Catlin v. Valentine*, 9 Paige, 575; *Brady v. Weeks*, 8 Barb. 157; *Dennis v. Eckhardt*, 3 Grant, 302; *Wood on Nuisances*, 11, 12, 470; *Rex v. White*, 1 Burr. 337; *Bishop of Auckland case*, 48 L. T. R. (N. S.) 223; *King v. Harris*, 4 T. R. 205.

⁴ 5 How. 504; *Wood on Nuisances*, 34, § 27; *id.*, §§ 1, 2; *Brady v. Weeks*, 8 Barb. 159; *Wharton Leg. M.* 195, 324; *Heeg v. Licht*, 80 N. Y. 579; *Polinsky v. People*,

embodies the general view of the legislature and the courts, especially as we generally find express statutes governing almost the whole range of this subject of nuisances.

There is also under constitutional limits a rightfully delegated power from the sovereign authority, which may include the authority of legislation, as for example in the adoption of ordinances and public regulations. Judicial and executive functions are likewise bestowed. There is no usurpation of either legislative or judicial prerogative, where not only the action itself, but its scope and manner of performance has the sanction of the legislature in terms sufficiently exact as to leave no doubt of their proper construction, and the right of the citizen to a hearing, a trial and a decision is secured by due process of law.

This phrase has been so often considered and construed by the courts, under the laws enacted in pursuance of police powers, that we may assume the legislative determination to be controlling, save in extraordinary cases of which rare precedents occur, when recourse must be had to the courts, not so much for an interpretation of the facts, as for a decisive construction and declaration of the law applicable to the particular controversy presented for adjudication. In *Davidson v. New Orleans*, the opinion of the United States Supreme Court is that "an exhaustive judicial inquiry into the meaning of the words 'due process,' as found in the Fifth Amendment, resulted in the unanimous decision of this court, that they do not necessarily imply a regular proceeding in a court of justice or after the manner of courts."¹ Mr. Justice Field, in *Bartemeyer v. Iowa*, says that the Fourteenth Amendment in no respect interferes with the police power of the State, and adds: "Certainly no one who desires to give to that amendment its legitimate use has ever asserted for it any such effect. It was not adopted for any such purpose." Mr. Justice Andrews, in *Bertholf v. O'Reilly*, in delivering the opinion of the court, affirming a judgment against the owner of real property leased to one who sold intoxicating liquors, which caused the injury, under the Civil Damage Act, says, quoting Judge Cooley "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of the law sanction, and under safeguards for the protection of

73 N. Y. 65; N. Y. Cons. Act, §§ 535-536; *Health Department v. Knoll*, 70 N. Y. at p. 535; *Schrumpff v. People*, 14 Hun, 10.

¹ 96 U. S. 102; 18 Wall. 138; 74 N. Y. at p. 519; *Head v. Amoskeag M. Co.*, 118 U. S. 9, esp. p. 26.

individual rights, as those maxims prescribe, for the class of cases to which the one in question belongs."

A very good illustration, under this title, is in the discussion of the Mills Acts, their process and the decisions upon them, in *Head v. Amoskeag Manufacturing Company*. It was argued that private property was exempt from a taking for other than public purposes, and whether a use was public or private was a question of general law. The act permitted any person or corporation to erect and maintain a water-mill and dam, to raise the water for working it, or for creating a reservoir of water, and for equalizing the flow of the stream for its use, and of mills below, etc., etc., and provided compensation for lands overflowed or injured, to be determined by a committee of three disinterested persons, to be appointed by the court. It was held that the act being a constitutional exercise of legislative power, and providing a suitable remedy, by trial, in the regular course of justice, to recover compensation for the injury to the land of the plaintiff in error, it has not deprived him of his property without due process¹ of law, citing previous decisions of this court.

It were useless to attempt a catalogue of nuisances, even so far as they relate to our present subject. The general rules by which they may be distinguished are provided in the decisions of the courts in the cases as they arise. Their extent and variety equals the boundaries of the police powers, which they awaken by their abuses, and they are

¹ See *Hagar v. Reclamation District*, 111 U. S. 701; *Blair v. Corning County*, id. 868. This construction of the words, "due process of law," has been given here with citations, principally, because it is under this head that objections are constantly made to official acts in abatement or restriction of nuisances. In the Reclamation cases (111 U. S. 718-715, note), a list is given of the processes to secure the property rights of the citizen. Another process is found in the Mills Acts, of which a list is to be found 113 U. S. 17-18. The Mills Acts to be sustained, on other grounds than that they are confirmed by long usage, cannot be readily referred to the doctrine of eminent domain, for the public use is questionable, except for grist-mills, which grind for all comers, at tolls fixed by law. They must come under the safer rule, held by the U. S. Supreme Court, that these acts are valid, "as a just and reasonable exercise of the power of the legislature, having regard to the public good, to regulate the use of the water power of running streams, which, without some such regulation, could not be beneficially used." This is the police power and brings the case under the precedents of a *legalized nuisance*, and does not exempt from claims for private and special damage and injury. 113 U. S. 26; 106 U. S. 832-834; 2 Harr. (N. J.) 15; 12 N. Y. 486; 5 Cow. 165. Under immigration laws, the decisions of executive and administrative officers, acting within powers conferred by Congress, are "*due process of law*." U. S. Sup. Ct., Jan. 18, 1892, *Ekin v. U. S.*, 142 U. S. 651.

seen in new forms when they touch upon private rights, inflict special injury and provoke actions. They are both new and old, for the courts have always been busy with them, and yet new species develop as civilization urges on and compresses the life, enterprise and necessities of community existence. The different points of view from which the same hurt or injury may be regarded, has led a learned author to add to the two ancient classes a third — *mixed nuisances*; and in an earlier edition he said many instances might be enumerated, "where acts have been held to constitute a public nuisance that had never been directly held so before by the court."¹ He devotes a chapter "to private injuries from public nuisances" which have been the occasion of many judgments and are forcibly discussed in the opinion in *Baltimore & Potomac Railroad Company v. Fifth Baptist Church*.² "In fact no precise definition" can be given, and each case must be adjusted by itself," the Chancellor says, in *Ross v. Butler*.

What constitutes a nuisance, is generally a question for the court, but whether the results are so common as to amount to a public nuisance, is a question for the jury. And yet, the digging of post-holes in a street is a public nuisance, although in a part of it not used, nor susceptible of use by the public by reason of natural obstructions therein. It is shown by the same authority that nuisances may be both public and private. Mere diminution in value of property, or that something disagreeable arises from the use of property, unless the legal rights of those in the vicinity are invaded, or common injury is shown, will not sustain an action, and for a private remedy special and substantial damage peculiar to the plaintiff must be shown.³

¹ Wood on Nuisances (1st ed.), 34; (2d ed.), § 24, p. 36; pp. 15-28, chap. 19; see License cases, 5 How. 89; Wharton Leg. Max. 195-324.

² 108 U. S. 315; 1 Russ. Cr. 819; *Rex v. White*, 1 Burr. 337; *Lansing v. Smith*, 8 Cow. 146.

³ 4 Blackst. Com. 166; *Ross v. Butler*, 19 N. J. Eq. 294; *Tipping v. St. H. S. Co.*, 4 B. & S. 608; *State v. Atkinson*, 24 Vt. 448; *Harrower v. Ritson*, 37 Barb. 301; *Bohan v. Port Jervis G. L. Co.*, 122 N. Y. 18.

⁴ *Wright v. Saunders*, 65 Barb. 219; 8 Keyes, 323; *Com. v. King*, 13 Metc. 115; *Congreve v. Smith*, 18 N. Y. 79; *People v. Corporation of Albany*, 11 Wend. 538; *Cogawell v. N. Y., N. H. & H. R. R.*, 103 N. Y. 10; *Francis v. Schoellkoff*, 53 N. Y. 152; *Ross v. Butler*, 19 N. J. Eq. 274; *Rhodes v. Dunbar*, 7 P. F. Smith (Pa.), 275; *Hackenstein's Appeal*, 70 Pa. St. 102; *Att'y-Gen. v. Stewart*, 19 N. J. Eq. 415; *State v. Woodward*, 24 Vt. 92; overhanging trees as a nuisance, *Hickey v. Mich. Cent. R. Co.*, 96 Mich. 498; *Grandona v. Lovedol*, 70 Cal. 161; *Jones v. Williams*, 11 Mees. & W. 181; *Earl of Lonsdale v. Nelson*, 2 B. & C. 302; electricity as a nuisance, 48 Alb. L. J. 297; 1898; *Nat. Tel. Co. v. Baker*, 2 Ch. 186.

In *Attorney-General v. Stewart* the court says: "Any trade or business lawful in itself, which from the place or manner of carrying it on materially injures the property of others, or affects their health, or renders the enjoyment of life physically uncomfortable, is a nuisance. There are certain things and certain trades which are considered nuisances of themselves, as a slaughter-house in a thickly settled town, a pigsty near a dwelling-house, and, perhaps, to these may be added a fat-melting or rendering house, when carried on extensively in a populous neighborhood, or near inhabited dwellings. *But these are not nuisances simply because they are erected within the limits of an incorporated city*, and the question whether they will be a nuisance depends upon the extent of business carried on there and the manner in which it is conducted."

The importance, usefulness and necessities of a lawful business are allowed much weight. In *Burns Justice* we read: "It hath been holden that it is no common nuisance to make candles in a town, because the needfulness of them shall dispense with the noisomeness of the smell;" but this statement is qualified later. In *McKeon v. See* there is a double distinction that "although certain occupations, trades or manufactures may become a nuisance in a populous city, which would not be so in the country, or among a scattered population, there is no principle which outlaws premises on which a nuisance exists, so as to prevent the owner from being protected from nuisances on other premises." It was the common-law rule, that "a reasonable use of a right is not a nuisance, though it be to the annoyance of another, as if a butcher or brewer use his trade in a convenient place, though it be to the annoyance of his neighbor."¹

In *Salvin v. North Brancepeth Coal Company*, it was held that the plaintiff had not made out a case of substantial injury, who had shown that his house and plantation were, respectively, within 1,400 yards from, and under the annoyance and injury from, 250 coke-ovens of the defendant; but it was a "black country," with

¹ *McKeon v. See*, 4 Robt. (N. Y.) 449; Comyn's Dig. 1, 427.

² 31 L. T. R. (N. S.) 154; to same effect, *Ballentine v. Webb*, 84 Mich. 88. This was the case of a slaughter-house held not to be a nuisance, but the refuse was ordered carried away in close wagons daily. The unavoidable noise from hogs left in close confinement was not such a nuisance in that neighborhood as to justify an injunction. As to a petroleum refinery occupying four acres at Allegheny City, on the Ohio side, see *Com. v. Miller*, Pa. Sup. Ct., 21 Atl. R. 188, citing *Wood on Nuisances*, 430; 70 Pa. St. 102; 8 Eng. L. & Eq. 221. See the question of the natural use of land

many collieries and furnaces—it was a lawful trade, and not negligently managed. On the same principle an owner of land may not be prevented from filling up wet and marshy places on his own soil, for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it, and he “cannot be compelled to suffer his land to be used as a reservoir or water-table for the convenience or advantage of others, although the stream into which he drains does not keep up as it did before, and the supply which the said stream was accustomed to receive was earlier exhausted.” In like manner one may dig out, wall up, and increase the flow of water from a spring on his own land, although some injury from the increased flow of water, at some seasons, may result from the improvement. But, while a man may overflow his own land,¹ yet, “if such overflow spread disease and death through the neighborhood, it may be abated, and he must respond in damages for the special injury.” Even the construction of the roof of a building in a city, “so that snow falling upon it is liable to be precipitated upon the sidewalk,” is a nuisance, “for it necessarily impairs the safety of persons passing below it in the lawful use of the street upon which it fronts.”

discussed, *Sanderson v. Pennsylvania Coal Co.*, 102 Pa. St. 302; 113 Pa. St. 126; *Bohan v. P. J. G. L. Co.*, 122 N. Y. 18; *Rylands v. Fletcher*, L. R., 3 H. L. 330; *Pennington v. Brinsop Hall Coal Co.*, L. R., 5 Ch. Div. 769. A recent case in the Supreme Court of Indiana—*Barnard v. Shirley*—reviews many of these decisions, and arose upon these singular facts. Adjoining plaintiff's farm, at Martinsville, in that State, a well was drilled and from it a large volume of water flowed, which, after being used for bath-houses, was carried by a drain into a stream running through plaintiff's land. The water was found to possess curative qualities. Some of the persons who used the bath-houses were afflicted with contagious diseases, and it was charged that the water was so polluted as to injure the health of persons living upon the land and drinking the milk from cows pastured there. The Supreme Court decided that, “as the use of the springs was lawful and could not be carried on elsewhere, and was a public benefit, it was only necessary that it should be conducted with due care, and any injury then resulting must be borne without compensation.” *Barnard v. Shirley*, 84 N. E. R. 600.

¹ *Waffle v. N. Y. C. R. R. Co.*, 58 N. Y. 413; see *Gould v. Booth*, 66 N. Y. 62; *N. Y. C. & H. R. R. Co. v. The City of Rochester*, 127 N. Y. 591; *Waffle v. Porter*, 61 Barb. 130; *Mills v. Hall*, 9 Wend. 315.

² *Walsh v. Mead*, 8 Hun, 390; *Shipley v. Fifty Associates*, 101 Mass. 251; 106 Mass. 194; see *Wenzlick v. McCotter*, 87 N. Y. 122. A conductor pipe designed to convey water from the roof of a building in a city to the ground, when constructed with due care and proper precautions, in the absence of a municipal ordinance forbidding the discharge of water in this manner, though it freeze and form ice on the sidewalk, is not to be deemed a nuisance. See *Weston v. City of Troy*, 139 N. Y. 281.

It is evident that to bring disturbances of the comfortable enjoyment of life, or injuries by nuisances, under the control of the police powers, properly exercised by the local or State government, three elements must be found united, which may be classed, as a common injury, some violation of a right, and some substantial damage. In the case of *Mills v. Hall*, it is seen that the paramount rule of public safety must govern, for the court holds that rights and immunities of private citizens must yield when opposed to the public health, although otherwise the defense of title and lawful use would be sufficient.

It will be useful, however, to note the large number of cases cited in every leading decision on this subject, for the lines are often finely drawn and the analysis subtle, which divide actions and remedies on complaints of injuries, as we may instance in the cases of *Salvin v. North Brancepeth Coal Company*, and *Campbell v. Seaman*.¹ We also observe that, in regard to offensive trades, we are necessarily remitted, more and more, to the judgment and discretionary action of local authorities, because, in their ever new appearances and influences, they cannot be provided for in express terms, and in definite specific provisions of law. But to enumerate some of the decided cases will be useful for explanation and for reference.

The singing of a ribald song, containing the stanza charged in the indictment, in a loud and boisterous manner on the public street, in the presence of divers persons, continued for the space of ten minutes, is a nuisance, although the special words charged may not have been repeated.² Unnecessary outcries in a street, in malice and mischief, and not to give warning of danger, are a public nuisance. A defendant was convicted on an indictment for making great noises in the night with a speaking trumpet, to the disturbance of the neighborhood, which the court held a nuisance.³

“If a person collects together a crowd of people to the annoyance of his neighbors, that is a nuisance for which he is answerable; although it may not be his object to create a nuisance, yet, if it be the probable consequence of his act, he is answerable as if it were his actual object; if the experience of mankind must lead any one to expect the result,

¹ 31 L. T. R. (N. S.) 154; 63 N. Y. 568.

² *State v. Toole* (N. C.), 11 S. E. R. 168.

³ *State v. Graham*, 3 Sneed (Tenn.), 134; *Com. v. Oakes*, 118 Mass. 8; 1 Russ. Cr. 327; *Rex v. Smith*, 1 Str. 704; and see a precedent for keeping dogs which made noises in the night, 2 Chitty Crim. L. 647.

he will be answerable for it."¹ In *Rex v. Moore* an indictment charged the defendant with keeping certain inclosed grounds near to the highway, and to certain houses, for the purpose of persons frequenting such grounds, and meeting therein to practise rifle shooting, and to shoot at pigeons, with guns; and that he did unlawfully and injuriously cause divers persons to meet and frequent there for that purpose, and did unlawfully and injuriously permit and suffer, and cause and occasion a great number of idle and disorderly persons, armed with guns, to assemble in the street and highways, and other places near the said premises, discharging fire-arms and making a great noise and disturbance, by means whereof the king's subjects were disturbed and put in peril; the defendant had converted some land, about one hundred feet from a public road, into a shooting ground, where persons came to practise with rifles and to shoot at pigeons, and as the pigeons which were fired at often escaped, it was the custom for idle persons to collect outside the grounds, and on the neighboring fields, to shoot at the birds as they strayed, by which a great noise and disturbance was created. It was objected that the defendant was not responsible, as he neither committed the nuisance in his own person, nor was it his object to induce others to commit it, nor was it a necessary and inevitable consequence of any act of his, being done by persons beyond his control, and those persons being themselves amenable to punishment for it; but it was held that the evidence supported the allegation that the defendant caused such persons to assemble, and the defendant was liable to be indicted for a nuisance.

It has been held an indictable offense to exhibit at the windows of a shop on a public street effigies, and attract a crowd which causes the footway to be obstructed so that the public cannot pass as they have a right to do.² The keeping in a public house of "a certain common, ill-governed and disorderly room, suffering for lucre, disorderly persons to meet and remain there by night and by day, drinking, tippling, cursing, swearing and quarreling, making great noises rolling bowls in and at a game commonly called ten pins," is a public nuisance.³ In this case the noise and disturbance of the neighborhood would also make the place a disorderly house.

¹ *Rex v. Moore*, 3 B. & Ad. 184; *Rex v. Carlisle*, 6 C. & P. 625; *Bac. Abr.*, tit. Nuisances; *Rex v. Higginson*, 2 Burr. 1233; *Gregory v. Tuffs*, 6 C. & P. 271; 4 Tyrw. 320; *Gregory v. Tavenor*, 6 C. & P. 280; 1 Russ. Cr. 322.

² *Rex v. Carlisle*, 6 C. & P. 625; *Rex v. Russell*, 6 East, 427.

³ *Bloomhaff v. The State*, 8 Blackf. 205.

Disorderly inns may be public nuisances, and various offenses were charged against them as such, including that of demanding exorbitant prices. Bawdy, gaming and disorderly houses have been universally classed as nuisances.¹ A concert saloon, where men and women are allowed to come together for improper purposes, has been held a disorderly house,² as also a tippling house, where disorderly persons congregate. The owner may be held liable if he knowingly rents it for such use. A cock-pit was indictable at common law, also a common stage for rope dancers. Driving horses through a public street so as to endanger the lives of passers-by has been declared a public nuisance, because public safety is paramount law. To permit a furious mastiff or bull dog to go at large and unmuzzled may be a nuisance, and "from the ferocity of his nature being dangerous and a cause of terror to his Majesty's subjects" the owners may be indicted.³ Singing birds have been found nuisances and abated in cities, and the practising on musical instruments has been restrained. A case was reported from London where a violoncello was complained of, played by an amateur for eight hours a day, including Sundays, and the court held that no man was justified in practising so many hours in "mansions" or flats, and three hours a day was quite long enough.

Other nuisances affecting the peace and good order of the neighborhood may be mentioned. Eavesdroppers are public nuisances, secretly listening at doors of jury rooms or in public buildings, or at doors and windows, to frame mischievous tales.⁴ A common scold was a public nuisance, and the Massachusetts law, ap-

¹ 1 Russ. Cr. 327; 1 Hawk. P. C. C. 78, note; *Rex v. Davies*, 5 T. R. 626; 2 Hale, 174; 1 Russ. Cr. 323; *Reg. v. Williams*, 1 Salk. 883; *Bac. Abr.*, tit. Nuisances; see *Tanner v. Trustees*, 5 Hill, 121; *Com. v. Goding*, 8 Metc. 180; *State v. Williams*, 30 N. J. L. 102; *James Butler's case*, 1 City Hall R. 66; *State v. Hand*, 7 Iowa, 411; *U. S. v. Columbus*, 5 Cranch U. S. C. C. 304.

² *Gregory v. Taff*, 6 C. P. 271; *Bloomhaff v. The State*, 8 Blackf. 205; *People v. Erwin*, 4 Denio, 129; *State v. Bailey*, 21 N. H. 343; *Clementine v. State*, 14 Mo. 112; *State v. Stevens*, 40 Me. 559; *Meyer v. State*, 41 N. J. L. 6; *Rex v. Howell*, 8 Keb. 510; 1 Hawk. P. C. C. 75, § 6; *Bac. Abr.*, tit. Nuisances; see *Wood on Nuisances*, p. 37.

³ 1 Russ. Cr. 327, note; *Burns Just.*, tit. Nuisances, 1; 3 Chitty Cr. L. 643; see *N. Y. L. J.*, Dec. 29, 1890, and *N. Y. San. Code*, § 172.

⁴ *State v. Pennington*, 3 Head (Tenn.), 299; *Com. v. Lovett*, 4 Clark (Pa.), 5; 1 Russ. Cr. 327. Eavesdroppers or such as listen under walls or windows or the eaves of a house to hearken after discourse, and thereupon to frame slanderous and mischievous tales are a common nuisance and presentable at the common leet or are indictable at the Sessions and punishable by fine and finding sureties for good behavior. 4 Blackst. Com. 167; *Burns Just.*, tit. Eavesdroppers.

parently retaining cognizance of the crime, fixes it upon either sex.' Secretly breaking into a dwelling-house and making a great noise, whereby a pregnant woman therein miscarried, has been held a public nuisance;¹ also screening coal in a public place,² and sawing long sticks of timber in the street before they are carried into a timber yard.³ "The accumulation of a large number of bales of cotton on a public street, near the business centre of a city, in such a manner as to obstruct the street, though a passage is left for footmen, by whom it is almost solely used, and to expose the city to the danger of the cotton being fired by passing engines and smokers, is a nuisance."⁴ A ruined or dilapidated wall, threatening to fall on a public street, is a nuisance.⁵

Whatever openly outrages decency, and is injurious to public morals, is a misdemeanor. The publication of an obscene newspaper is a public nuisance.⁶ In *Harring v. Walsond*, a monstrous child that died, was embalmed, to be kept for a show, but was ordered by the Lord Chancellor to be buried.⁷ In *Rex v. Crunden*, McDonald, C. B., ruled, "that whatever place become the habitation of civilized men, there, the laws of decency must be enforced."⁸ In *Rex v. Sir Charles Sedley*, it was found that defendant showed himself naked from a balcony, in Covent Garden. He confessed the indictment, and was sentenced to pay a fine of 2,000 marks, to be imprisoned a week and give security for good behavior for three years.⁹ Indecent exposure of the person, either on a sea beach, or in the yard of a house in a city, is *contra bonos mores* and a nuisance.¹⁰ "Exhibiting a stud horse, in a public street, is a public nuisance, because in violation of public decency."¹¹ "Urinating in a spring, at which the public are accustomed to drink, is a public nuisance."¹²

¹ *J. Anson v. Stewart*, 1 T. R. 754; *Rex v. Cooper*, 2 Str. 1246; *Regina v. Forby*, 6 Mod. 213; *Com. v. Harris*, 101 Mass. 29; *Field's case*, 6 City Hall R. 90; *Roacoe's Cr. Ev.* 74; *Com. v. Foley*, 99 Mass. 497.

² *Com. v. Taylor*, 5 Binn. (Pa.) 277.

³ *Com. v. Warren*, 4 Gray, 213.

⁴ *Rex v. Jones*, 3 Campb. 280.

⁵ *Marine Ins. Co. v. St. L. I. M. & S. R. Co.*, 41 Fed. R. 643.

⁶ *Murray v. McShane*, 52 Md. 217; 36 Am. R. 367.

⁷ 1 Hawk P. C., chap. 5, § 4; 1 and 2 Vict., chap. 38; 4 Blackst. Com. 65; 1 Russ. Cr. 326; *State v. Harrison*, 23 Tex. 232; *Wood on Nuisances*, 32.

⁸ 2 Chan. C. 110; 1 Russ. Cr. 326, note c.; cited in *Burns Justice*, tit. Nuisance.

⁹ 2 Campb. 89; 1 Russ. Cr. 326, note.

¹⁰ 1 Keb. 620.

¹¹ *Rex v. Crunden*, 2 Campb. 89; *Miller v. People*, 5 Barb. 203.

¹² *Nolin v. Mayor of Franklin*, 4 Yerg. 163; 1 Russ. Cr. 324.

¹³ *State v. Taylor*, 29 Ind. 134.

In *Miller v. The People*, upon an appeal, the facts were considered by the court, and particularly, that the neighbor who complained was on bad terms with the defendants, that, with one exception, there were no other dwellings within a quarter of a mile, and that it was for the jury to find whether there had been any intentional wanton and indecent exposure. It was held, there was error in that this was withdrawn by the charge to the jury from their consideration. Also, that the intent, in such a case, was a material ingredient, and a new trial was necessary.

Affrays and disturbances in a church, or a churchyard, were not only punishable by statute, but were cognizable by the law courts, as Lord Mansfield said *pro salute animae*.¹ Disturbance of any religious meeting was a nuisance, as of a Lutheran congregation, under the English law, or of a camp meeting in South Carolina. It was held to be "a place set apart for the worship of Almighty God," and thus under the protection of the law.²

Encroachment on a turnpike, by a railroad exceeding the limits of law, is a nuisance, and for special damages, as for fright and death of a horse, the railroad is liable.³ Unsafe highways and bridges are indictable as nuisances.⁴ Obstructions of highways⁵ are nuisances. A constable, who obstructed a highway for the sale of goods taken on execution, was held guilty of nuisance. A fence on a highway is a public nuisance.⁶ In *Smith v. Commonwealth*, it was held that a person who keeps a house wherein offenses punishable by fine are committed, creates a nuisance, because such places are in derogation of public morality'. The erection of a private building upon land reserved for a public square, which has been illegally sold by the public authorities, is a nuisance of such an irreparable nature as to give a court jurisdic-

¹ *Wilson, Clerk, v. Greaves*, 1 Burr. 260; see N. Y. Penal Code, § 650.

² *Rex v. Hube*, Peakes R. 131; *State v. Hall*, 2 Bailey (S. Car.), 151; 1 Russ. Cr., chap. 28; *Williams v. Glemster*, 2 B. & C. 699.

³ *Moshier v. Utica & S. R. R.*, 8 Barb. 427; see *Rex v. Pease*, 4 B. & H. 80; *Bordentown v. S. Amboy T. Co.*, 17 N. J. L. 814.

⁴ *Providence v. Clapp*, 17 How. 161; *Hall v. Richmond*, Woodb. & M. 839; 38 Me. 460; 4 Cush. 365; 6 Vt. 496; 13 Pick. 342. Fireworks at the junction of two narrow streets a nuisance. *Speir v. City of Brooklyn*, 139 N. Y. 6.

⁵ *Rex v. Russell*, 6 East, 427; *People v. Cunningham*, 1 Denio, 524; *Com. v. King*, 13 Metc. 115; *Wetmore v. Tracy*, 14 Wend. 250; *Wright v. Saunders*, 65 Barb. 214; *Com. v. Milwain*, 13 S. & R. (Pa.) 403; *Rex v. Carlisle*, 6 C. & P. 636.

⁶ *Rex v. Russell*, 6 East, 427; *People v. Cunningham*, 1 Denio, 524; *Irvine v. Wood*, 51 N. Y. 224.

⁷ *Smith v. Com.* (Ky.), 6 B. Monr. 21; *U. S. v. Hart*, Pet. C. C. 390.

tion to grant a perpetual injunction. A structure erected without lawful authority on a street is a nuisance, and the line of decisions which confirm the rights of owners of property abutting on public streets, to easements of ingress and egress, air, light and ventilation, free from the obstructions of platforms and structures of elevated railroads, confirm and extend the rule which has long since been declared in favor of similar rights in private actions.¹

An ordinance of the city of New Orleans, which prohibits smoking in street-cars under penalty of fine and imprisonment, is not unconstitutional, since it neither deprives any one of personal liberty nor invades any right of private property.² On a bill to enjoin the building of a railroad track across a street, "the evidence showed that plaintiff owns improved property on one of the streets, where he lives and does business as a retail merchant; that the street on both sides of the crossing is populous, filled with stores, shops, boarding-houses and residences; that the proposed railroad track will divert travel from it, decrease the value of plaintiff's property, and take away some of the trade which he now enjoys. Held, a sufficient showing of special injury to enable plaintiff to enjoin the crossing as a public nuisance."³ Defendant maintained a dam on a river which caused the waters to overflow the highway, whereby the plaintiff town was put to yearly expense in repairing the same. Held, that plaintiff had suffered special damage from the nuisance, being bound to maintain the highway, and could recover such damages.

A powder magazine maintained within the limits of an incorporated town in violation of its ordinances is a nuisance *per se*.⁴ A fat rendering factory, which nauseated by its odors a dozen people living in the vicinity, so that one man gave up work, others refused to work be-

¹ State v. Harrison, 23 Texas, 232; Com. v. Mann, 4 Gray, 218; Story v. N. Y. El. R. R., 90 N. Y. 122; Glaessner v. Anheuser Busch B. Co. (Mo.), 13 S. W. R. 707; Inhabitants of Charlotte v. Pembroke Iron Works (Me.), 19 Atl. R. 902; Dexter v. Tree, 117 Ill. 532. A dam maintained at an unlawful height in a navigable river. Arpin v. Bowman, 88 Wis. 54.

² State v. Heidenhain (La.), 7 So. R. 621.

³ Glaessner v. Anheuser-Busch Brewing Ass'n (Mo.), 13 S. W. R. 707.

⁴ Inhabitants of Charlotte v. Pembroke Iron Works (Me.), 19 Atl. R. 902.

⁵ Laffin Rand Powder Co. v. Teamey (Ill.), 23 N. E. R. 339. It has been doubted whether the corporation of Philadelphia has the right to license a nuisance. Com. v. Passmore, 1 Serg. & R. 217. A small-pox hospital was held not to be within the definition of the English Public Health Act, as a "*noxious business*," but it was questioned whether, in a proper action, it might be viewed as a nuisance *per se*. Wittington Board of Health v. Corporation of Manchester, 68 L. T. (N. S.) 337.

cause of the stench, a number of families were obliged to stay indoors and close their windows, was determined to be a nuisance, because "the odors were hazardous to the public health within the meaning of the statute."¹ The use of fuel which develops a dense or pungent smoke has been held a nuisance.² In *Rex v. Neil*, Abbot, C. J., where a varnish factory was involved, stated the provision which distinguishes many of these cases, as follows: "The only question, therefore, is this: Is the business as carried on by the defendant productive of smells offensive to persons passing along the public highway?" Any act which pollutes and corrupts the air so as to produce a real and sensible damage constitutes a nuisance, and, in respect thereto, Mr. Justice Thompson, in *Dennis v. Eckhardt*, says: "Yielding to this rule of equal rights, I cannot find authority in the law for saying that a thing which fills the atmosphere, that others have a right to live in, with offensive smoke and odors, stifles the breath, produces nausea and headache, drives children from their playgrounds and men from their gardens, prevents the drying of clothes and ventilation of houses, darkens the sunlight, and converts pleasant residences into prison-houses in dog-days, and defiles carpets, curtains, and dinner plates with deposits of soot and dirt, is not a nuisance, even though such results are only occasional."³

Noise⁴ and vibration have been considered elements of nuisance, and these noises, from whatsoever cause, will, on a proper case made, be a sufficient ground for an injunction, and, therefore, annoyances therefrom occasioned by unusual and unreasonable hours of work are preventable. In like manner the ringing of church bells at unreasonable hours, or in an unreasonable way, has been enjoined as a nuisance, and it was held that a music master must not give lessons or practise so as to be a nuisance to his neighbors.⁵

¹ *State v. Neidt*, N. J. 19, A. R. 818.

² *Rhodes v. Dunbar*, 57 Pa. St. 275; *Saville v. Kilmer*, 26 L. T. R. (N. S.) 277; *Cartwright v. Gray*, 12 Grant Ch. (Ont.) 400; *Crump v. Lambert*, 9 L. R., 8 Eq. Cas. 409.

³ *Rex v. Neill*, 2 C. & P. 485; *Rex v. Watts*, id. 486; *Rex v. Pappineau*, 1 Str. 686; *Morley v. Pragnall*, Cro. Car. 500; *Moshier v. Utica & S. R. R. Co.*, 8 Barb. 432.

⁴ *Bispham's Pr. Eq.* 498; 3 Grant's Cases, 302; *Smith v. Cummings*, 2 Par. Sel. Cas. (Pa.) 92.

⁵ Am. Leg. Reg., Oct., 1883; *Bispham's Pr. Eq.* 498; *Wood on Nuisances*, 688; *Fish v. Dodge*, 4 Denio, 816; *White v. Cohen*, 1 Drewry, 318.

⁶ *Harrison v. St. Mark's Ch.*, 3 W. N. C. 389; 34 Leg. J. 222; *Scott v. Frith*, 10 L. T. (N. S.) 290; *Davis v. Sawyer*, 138 Mass. 280; *Leete v. Pilgrim Cong. Ch.*, 14 Mo. 590; see 43 Alb. L. J. 102. In a case, 1720, *Peere Williams*, it was agreed the five o'clock bell should not be rung; *Christie v. Davey*, L. R., 1893, 1 Ch. 816.

It has been said that a difference exists between other days and the rule of the present time, and that we may not term any lawful trade, occupation or use a nuisance *per se*; but this may well be doubted, for the elements of nuisance, by corruption or misuse, or even as in the case of a slaughter-house, by the recent incoming of inhabitants to new portions of a city, and many trades and uses of property otherwise lawful, have been held, under the particular circumstances, nuisances.¹ In *People v. Rosenberg* it was held very recently by the Court of Appeals of New York, that the State legislature may regulate or prohibit the carrying on of any business, in such a manner and in such place, as to become dangerous and detrimental to the health, morals or good order of the community. The court adds, however, "that an intention should not be attributed to the law-making power to arbitrarily interdict the conduct of any business theretofore recognized as lawful, irrespective of its effect upon health, morals or public order, unless it has, in the statute itself, used language of such explicit import as to preclude any other construction, and in the case at bar, the judgment was reversed, because evidence competent and material under the terms of the statute in question, upon the issue of the existence of a nuisance, had been improperly excluded.

Where objection was taken to the use of a steam engine producing noise and jar, the court says: "Mere noise, unless unusual, ill-timed or deafening, may not be such a nuisance as to authorize an indictment or action therefor, even when it interferes with another person's avocations or pursuits. Thus the hum, bustle and voices of a school, which disturbed the studies of a professor in the neighborhood, or the passage of railway trains near a church. A neighbor's light may be obscured by a wall built upon one's land without such responsibility, because the right so to build is part of the elements of ownership."

¹ Wood on Nuisances, 650-657; *Regina v. Croos*, 2 C. & P. 484; *Bishop v. Banks*, 33 Conn. 118; *Aldred's case*, 9 C. R. 596; *Fellers v. Penn. R. R. Co.*, 1 W. N. C. 295; *Rhodes v. Dunbar*, 7 P. F. Smith, 275; *Fish v. Dodge*, 4 Denio, 816; *Bispham's Pr. Eq.* 493; *Brady v. Weeks*, 8 Barb. 156; 2 Lilly Reg. 309; *Poynton v. Gill*, 2 Roll. Abr. 140; *Rex v. Wilcox*, a glass house at Lambeth, 2 Salk. 458; *Reg. v. Pierce*, soap boilery at Ludgate Hill, 2 Shower, 327; *Sampson v. Smith*, 8 Sim. 272; *Whitney v. Bartholomew*, 21 Conn. 213; *Pickard v. Collins*, 23 Barb. 444; *Barnes v. Hathlom*, 54 Me. 124; *Curtis v. Winslow*, 88 Vt. 690; Wood on Nuisances, 598; see *People v. Rosenberg*, as to constitutional power to prohibit a business as a nuisance, 138 N. Y. 410, 416.

² *McKeon v. See*, 4 Robt. 466, 467; *Comyn's Dig. C. 294*; *First Baptist Church v. Utica & S. R. R. Co.*, 6 Barb. 313; *Mahan v. Brown*, 13 Wend. 91.

Burning one's fallow land is a legal mode of using it, and a neighbor is bound to protect himself against the spreading of a fire kindled for the purpose. In *Stuart v. Hawley*, it is said: "The mere fact that the fire was set in a dry time in July upon low, swampy ground, previously burned over and destitute of brush, will not be sufficient to allow recovery." An injury to a neighbor's house is not actionable by excavating on one side, except under a special statute in a city, or if the natural soil on the neighbor's side is disturbed. It were easier to follow the court in *Tipping v. St. Helens S. Co.*, and the citation made by Lord Westbury, in the old Scotch maxim, which forbids a man to use his own rights in *emulationem vicini*.¹ No one is justified in ruthlessly pursuing his own rights, or his choice of advantages and obligations; and in no class of cases, perhaps, is the application of the rule of law to the facts found, more dependent upon the discretion of the court, than in that of nuisances from offensive trades. Discriminations are to be made; first, that a reasonable use of property, both with regard to public and private interests, will not be interfered with, and in so far every one has the guarantee of the Constitution and the laws; second, that annoyances, such as are experienced by dwellers in populous towns and cities, must often be endured without redress, because they are of minor importance compared with the general good; third, that the questions of the origin, continuance and extent of a nuisance are important in any choice of courts or remedies, legal or equitable.

The ground of equity jurisdiction has been frequently stated to be, to prevent irreparable mischief and also to prevent offensive and vexatious litigation, but in *Hole v. Barlow* an action at law for damages from a brick kiln, causing noxious and unwholesome vapors to arise, the charge of Mr. Justice Byles was sustained by the court on appeal, that it is not everybody whose enjoyment of life and property is rendered uncomfortable by the carrying on of an offensive or noxious trade in the neighborhood that can bring an action.² He said the neighborhoods of Birmingham and Wolverston, in England, "would be full of persons bringing actions for nuisances arising from the carrying on of

¹ *Clark v. Foot*, 8 Johns. 421; *Stuart v. Hawley*, 22 Barb. 619; *Bennet v. Scott*, 18 Barb. 347; *Panton v. Holland*, 17 Johns. 92; *Farrand v. Marshall*, 21 Barb. 409; *Radcliff Exrs. v. Mayor*, 4 N. Y. 195, and cases cited; *Egerer v. N. Y. C. & H. R. R.*, 180 N. Y. 108; *King v. Morris & E. R. R.*, 18 N. J. Eq. 397; 11 H. L. Cas. 649; *Bisph. Pr. Eq.* 494.

² *Hole v. Barlow*, 4 C. B. (N. S.) 334; *Comyn's Dig.*, tit. Nuisances; *Doellner v. Tynan*, 38 How. Pr. 176; *Broom's Leg. Max.* 165; *New L. Lib.* 84.

the noxious and offensive trades in their vicinity to the great injury of the manufacturing and social interests of the country." The jury were instructed, that although the nuisance might be such as to render the plaintiff's enjoyment of his life and property uncomfortable, yet if they should find that the place where the business was carried on was a convenient and proper place for the purpose, the action could not be maintained. In *Attorney-General v. Lee*, where an injunction was sought against a mill, the court says: "But it appears to us this is a case of private nuisance, if a nuisance at all, in the erection of a mill, which will be a public convenience, and there is nothing to show that there is so great a disproportion between the private suffering and the public convenience as would authorize the court to interfere." And in *Pottstown Gas Co. v. Murphy* it was held that a certain degree of offensive odor, unavoidably incident to gas making, must be endured by the public.¹

In *Fish v. Dodge*,² although the responsibility of the creator of a nuisance is extended so that "he must find some way of putting an end to the injury," even though the erection be upon the land of another, and he has no right to enter for the purpose of removing it;" yet, the court says, "none of the cases go far enough to aid the plaintiff unless the defendant can be regarded as the author of the nuisance," and in *Babbage v. Powers*, the New York Court of Appeals, assuming the general doctrine that the public are entitled to the street or highway in the condition in which they placed it, says that when an excavation is made with the consent of proper municipal officers, the rule of liability relaxes its severity, and rests upon the ordinary principles governing actions of negligence."³

A notable example may be in stagnant water, which is a nuisance. This doctrine again has its exceptions. Stagnant water is a nuisance *per se*,⁴ but if left in a natural condition in wet lands, the courts have said the owners are not guilty of nuisance; at the same time the abatement of the nuisance may be compelled as a measure of health. In some States the cost must be borne by the lands, in others an assessment beyond the benefit conferred has been held unconstitu-

¹ *Atty.-Gen. v. Lee*, 8 Mad. Ch. 301; *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257; 38 How Pr. 184; *Pierce v. Dart*, 7 Cow. 609.

² 4 Denio, 317; 180 N. Y. 285, 286; see *N. Y. C. & H. R. R. Co. v. The City of Rochester*, 127 N. Y. 591.

³ *Babbage v. Powers*, 180 N. Y. 281.

⁴ *Green v. Savannah*, 6 Ga. 1; *Com. v. Webb*, 6 Rand. (Va.) 726; *Wood on Nuisances*, 681, note, and cases cited; see chap. IV; 17 Barb. 225; 17 Fed. R. 909; 58 Wis. 461; 32 Ind. 169; 144 Mass. 158.

tional. This, however, is a question of local law, for no physical nuisance is without some remedy, but as the maxims of law require this, justice equally insists that the remedy shall be a reasonable one under all the circumstances.

In *Mayor of Colchester v. Brooks*,¹ an action on the case for injuring the plaintiff's oyster beds, in a river, by improper navigation of the defendant's vessel, on the trial it appeared that the defendant's vessel, passing up the Colne, a navigable tide river, grounded at a point called the Hound, on an oyster bed claimed by the plaintiffs as their property, and there did considerable damage. For want of being properly anchored, the ship shifted her position when the tide rose, grounded in another place, and did new damage.

The jury found that oysters thrown into the mid-channel of the river were a nuisance, and tended to impede the navigation, and that the defendant's vessel grounded where the oysters were so thrown, and that in conducting the vessel there was no neglect as far as the first grounding, but that there was great neglect in leaving the vessel unmoored after she first grounded. The Court of Queen's Bench held that, although the oysters were placed in the channel of a public navigable river, so as to create a public nuisance, a person navigating was not justified in damaging such property by running his vessel against it, if he had room to pass without so doing; for an individual could not abate a nuisance if he was no otherwise injured by it than as one of the public; and, therefore, the fact that such property was a nuisance, was no excuse for running upon it negligently. Lord Denman, Ch. J., delivered the opinion of the court, and says if there was abundance of room and of water for the vessel to have passed up without going near the alleged nuisance, "however wrongful the act of the plaintiff, yet, as the defendant sustained no special inconvenience thereby, he certainly could not have been justified in willfully infringing upon or destroying the oysters, even for the purpose of abating the nuisance."

Much depends upon the decision whether the act or thing complained of be a nuisance *per se*, and in some instances decisions have differed upon the same subject.² The courts have even gone so far as to disregard the allegations that in the manner the business would be conducted it would not prove to be a nuisance to the neighborhood, and in

¹ 7 Q. B. 339; *Wales v. Stetson*, 2 Mass. 143; *Wetmore v. Tracy*, 14 Wend. 250; *Harrower v. Ritson*, 87 Barb. 301.

² *Wetmore v. Tracy*, 14 Wend. 252, and cases cited; *Francis v. Schoelkopf*, 53 N. Y. 155; *Rex v. Neil*, 2 C. & P. 485; *Renwick v. Morris*, 3 Hill, 621.

Attorney-General v. Colney Hatch Lunatic Asylum, the court would not consider either the loss to the defendants, or whether it were possible to abate the nuisance.¹

This, however, is the distinction oftentimes made between cases, as in *Russell on Crimes*, where the author states the principle many cases illustrate, that "only so much of a thing as causes a nuisance should be removed, as if a house be too high, only so much of it as is too high should be pulled down." And again, the thing itself has a very varying consideration. The Supreme Court of the State of New York held a bowling-alley kept for gain to be a nuisance. The Court of Common Pleas, constrained by this decision, finds that "a lease of the premises for the purpose of furthering the keeping of such an establishment is void," but also holds that mere knowledge that the lessee would use the premises in violation of the statute is not sufficient to avoid the lease.

But the doctrine in *People v. Seargent*, that a house kept even for games of chance, conducted for mere recreation, is not criminal at common law, when there is no prohibition by statute, and where no disorderly conduct or disturbance of the neighborhood is shown, has been more generally followed. There are also some offenses, which are declared to be nuisances, by the enactments of particular statutes. And where a statute declares a particular thing to be a common nuisance, it is indictable as such. An act of Parliament prohibited the erection of any building within ten feet of a road, and declared that if any such building should be erected, it should be deemed a common nuisance. By another clause, justices were empowered to convict the proprietor and occupier of such a building. It was held that the party who erected such a building, contrary to the act, might be indicted for a nuisance.²

¹ *Taylor v. People*, cited *Wood on Nuisances*, p. 76; *Jay v. Whitman*, 100 Mass. 76; *Catlin v. Valentine*, 9 Paige, 576; *Burnt Island Whale Fishing Co. v. Trotter*, 5 Wils. & S. App. C. 649; *Swinton & Others v. Pedie*, 15 Shaw & D. Sees. Co. 775; L. R., 4 Ch. (N. S.) 147.

² 1 Russ. Cr. 330; Co. 92, b. e.; *Babcock v. City of Buffalo*, 56 N. Y. 268; *Tanner v. Trustees of Albion*, 5 Hill, 121; *Updike v. Campbell*, 4 E. D. Smith, 570-579; *Rex v. Hale*, 1 Mod. 76; 1 Vent. 169 S. C.; *State v. Hall*, 32 N. J. L. 158; *People v. Seargent*, 6 Cow. 189; *Butler's case*, 1 City Hall Rec. 66; *Cuscadden's case*, 2 City Hall Rec. 53; *Com. v. Goding*, 3 Metc. 180.

³ 1 Russ. Cr. 327; *Rex v. Gregory*, 5 B. & Ad. 555; *State v. Heidenhalm*, 7 (La.) S. R. 621. As to municipal ordinances, where special powers have not been granted. *Clark v. Syracuse*, 13 Barb. 32; *Hutton v. City of Camden*, 39 N. J. L. 122; *Kirk v.*

The Boulevard Laws, in this country, have not gone so far, and have been considered under the law of eminent domain.

Municipal authorities have been held liable, not alone for permitting, but for neglecting to abate nuisances;¹ and, on the other hand, actions for penalties imposed by municipal ordinances have been sustained, and it has been repeatedly held that a municipal corporation has power to abate a nuisance. Many of these cases are considered, in *Cain v. City of Syracuse*, where it was held that the power conferred by local legislation did not make the city liable for injuries, caused by the falling of the wall of a building, which had become dangerous by reason of a fire. The common council had power to compel, by resolution, a dangerous wall to be taken down, and to require the summary removal or abatement of all nuisances, but, if there was error, it was a mistake of judgment, for which the city was not liable.

The more prolonged our inquiry, the greater growth we observe in the doctrine of these cases, upon the old foundations. Public utility, and safety and health are the defenses of what would otherwise be nuisances; but, on the other hand, private actions for special injuries have kept pace. Nuisances are recognized, and at the same time queries and exceptions disappear.² Compensation is not a condition in the case of a public nuisance, although it was an overweight to many of the older decisions. It has been said that neither the benefits from a noxious factory, nor prescription, nor the lawfulness and necessity of a trade are defenses, and it must be admitted that pecuniary loss to the defendant does not enter into consideration of either a public or a private nuisance. The learned author and the editors of *Russell on Crimes*, upon the query that "it should seem that on judging whether a thing is a public nuisance or not, the public good it does may, in some cases where the public health is not concerned, be taken into consideration, to see if it outweighs the public annoyance,"

Nowill, 1 T. R. 124; *Miller v. Burch*, 83 Tex. 206; *Wood on Nuisances*, 809; *Tiedeman L. P. P.*, 428. As to Boulevard Law, see *St. Louis v. Hill*, 22 S. W. R. 861; *Re Chestnut St.*, 118 Pa. St. 593; 12 Atl. R. 585.

¹ *Paige v. Fazackerly*, 86 Barb. 392; *Mayor v. Williams*, 15 N. Y. 502; *Village of Carthage v. Frederick*, 122 N. Y. 268; *Hart v. Mayor*, 9 Wend. 571; *People v. Albany*, 11 Wend. 539; 16 N. Y. 161; 46 N. Y. 194; 51 N. Y. 476; *Cain v. City of Syracuse*, 95 N. Y. 83; *Stone v. Charlestown*, 114 Mass. 223; *Hill v. Boston*, 122 Mass. 344; *Tindley v. Salem*, 137 Mass. 171; *Howland v. Maynard*, Sup. Ct., Mass., June, 1898, 34 N. E. R. 515.

² *Mugler v. Kansas*, 123 U. S. 628; *Lawton v. Steele*, 119 N. Y. 227; *Carleton v. Rugg*, 149 Mass. 550; *Wood on Nuisances*, 81; 5 Wills. & S. Parl. R. 649; 8 Barb. 157; 63 N. Y. 568, *supra*.

cite but one English case directly in favor and many against the proposition, yet the principle is not new, as we have seen in the example of the candle factory from *Burns Justice*, and *Hole v. Barlow* but repeats it. In the case of gas factories the *Pottstown* case sustained the public utility, and in a horse boiler case Lord Tenterden, C. J., directed an acquittal because the business was conducted in the most improved manner, and though the business was of an offensive description it had not increased the annoyances of the neighborhood.¹

The public health, moreover, may be immediately concerned in the disposition of the offal night-soil and refuse from a great city, and the provision by law made for it, so that those acting under it, if they keep within the limits of their powers and proceed with due care and skill, are not amenable to interference by action. Courts of equity have been loth to interfere with the sewerage discharge of great cities.² We are familiar with the location of sewerage farms near Paris, Croydon, Manchester and other places.³ In New York by legislation,⁴ the whole control over the removal of night-soil, dead animals, offal and refuse from the city was given to the Board of Health. Contracts made under this authority, for the conveyance of offal to Barren Island, in the vicinity of New York, ultimately led to a presentment by the grand jury of a neighboring county, obtained by persons interested in real estate at Rockaway Beach, Far Rockaway, Lawrence and Woodsburg, distant from two to six miles from the island, in July; and in October 1890, to an examination by the State Board. Its printed reports to the Governor and the legislature with all the proceedings (embodied in the Board of Health Report of 1891), and recommendations for the improvement of the processes employed not only in the rendering establishments of New York city refuse, but of fish factories on this island, have the following conclusion that "if these recommendations are enforced, the petitioners will be relieved of the nuisances they now com-

¹ 1 Russ. Cr. 820, note; *Rex v. Russell*, 6 B. & C. 565; *Rex v. Ward*, 4 A. & E. 484; *Rex v. Tyndall*, 6 A. & E. 143; *Potsdam Gas Company v. Murphy*, 89 Pa. St. 257; *Rex v. Watts, Moo. & M.* 281; *Attorney-General v. Stewart*, 19 N. J. Eq. 415; *Hole v. Barlow*, 4 C. B. (N. S.) 884; see *Pennington v. Brinsop Hall Coal Co.*, L. R., 5 Ch. Div. 769.

² 46 N. J. Eq. 178; *Goldsmid v. Tunbridge Wells Imp. Co.*, L. R., 1 Ch. App. 349. Pollution from street drainage held not actionable. *Washburn v. Worcester*, 153 Mass. 494; *Bishop. P. Eq.* 445; *Kerr on Injunctions*, 342.

³ *Genevilliers*: La Villette is within the fortifications of Paris; *Bedington farm* is near Croydon, and even in an epidemic the city had no injury from it.

⁴ Chap. 686, 1874, § 10; N. Y. City Cons. Act, § 566.

plain of." It was shown in this report that more or less nuisance was made by these factories, but not that the nuisance was carried four or six miles, and that "as appliances are being used to minimize the effluvia, and some of the works stopped during part of the year, the nuisance is not so great as stated by the petitioners." As persons settled along the seaboard it became necessary for the manufacturers to take measures to control the odors arising from their works, and from time to time more or less has been done. The enormous amount of material from the city of New York is given, and in this official report, to improve, and not to abolish these works, the board says "it feels its recommendations are just and based on sound principles."

It is not every impregnation of the atmosphere that creates a public nuisance or gives a right of action; and injury material and actual, not fanciful, must be shown, and something more than a violation, some naked legal right, before the court will lend its aid.¹ In *Morgan v. City of Binghamton*, the N. Y. Court of Appeals said that a "court of equity will not interfere by injunction with a plan of improvement adopted in good faith by municipal authorities, and within the scope of their authority where injury therefrom is doubtful, eventual or contingent." This action of municipal authorities undoubtedly has its limitations. A city may not empty its sewers upon private property,² and a parol license that the sewage from a particular district may be discharged upon private property; does not authorize the discharge thereon of sewage from a larger territory; and refuse matter from the city of New York has been held a nuisance in New Jersey. Nuisances as matters of purely private complaint have a different treatment, as is best shown in the two following cases. *Fogarty v. Junction City Press Brick Co.*, decided by the Supreme Court of Kansas in January, 1893, upon the authority of the New York case of *Campbell v. Seaman*, previously referred to.³

In the *Fogarty* case there is this additional ruling, that a land-owner who leases land to a company for the manufacture of pressed brick,

¹ *Wood on Nuisances*, §§ 1, 4; *People v. Canal Board*, 55 N. Y. 390; *McHenry v. Jewett*, 90 N. Y. 58; *Morgan v. City of Binghamton*, 102 N. Y. 500; *Doellner v. Tynan*, 38 How. Pr. 186; *Williams v. N. Y. C. R. R.*, 18 Barb. 247.

² *N. Y. C. & H. R. R. v. City of Rochester*, 127 N. Y. 591; *Noonan v. City of Albany*, 79 N. Y. 470; *Meigs v. Lister*, 23 N. J. Eq. 199; *Schriever v. Village of Johnston*, 54 N. Y. St. R. 573; *Jacksonville v. Doan*, 145 Ill. 23.

³ *Fogarty v. Junction City P. B. Co.*, 31 Pac. R. 1052, Feb. 28, 1893; *Campbell v. Seaman*, 63 N. Y. 568.

if a process is used that generates noxious gases that injure and destroy his growing crops, is not estopped from claiming damages for the injury occasioned by the nuisance, because he leased the land for that purpose, as he had a right to assume that the process used would be a reasonable and lawful one. This is consistent with the rule that negligence is not excused by a grant of powers¹, and with an indictment sustained against a canal company for not keeping up a bridge, which falling out of repair, became a common nuisance, and also with an indictment against a township for not repairing part of a highway within its limits.

Negligence or fault will do much to equalize the consequences of public and private nuisances. In *Campbell v. Seaman*,² the findings of the referee are that the defendant, whose lands adjoined lands of the plaintiff, had, for two years or more, been manufacturing brick, and in the manufacture mixed anthracite coal dust with the clay and sand in moulding, and in constructing this kiln portions of the brick were left out, and the space filled with anthracite coal dust; this coal dust, when the kiln becomes heated, takes fire, and gives sufficient heat to burn the brick to the outer layer. The burning of the kiln, under the process, caused a sulphurous acid gas, for at least the last two days of the burning, to escape from the kiln, which was very poisonous and injurious to persons who inhaled it, and very destructive to many kinds of vegetation. This gas, on several occasions, killed the foliage on the plaintiffs' white and yellow pines, and their Norway spruce; and had, after repeated attacks, killed and destroyed valuable pines and Norway spruce trees, and injured grapevines and plum trees.

The premises had been used for a brick-yard for over twenty-five years, and at the time the plaintiffs improved and beautified their property they knew that the property of the defendant had previously been applied to such use, and that, in such use and manufacture of brick, anthracite coal and coal dust were used and employed. Near the premises there was another brick-yard, and the railroad in front of, and near to the plaintiffs' premises had daily twenty-seven trains of cars propelled by locomotives burning and using the same description of coal as the defendant. The burning of brick did not affect the premises of the plaintiff, except in the case of a southerly wind at the time of burning, and such injuries happened only at times, and not continually, while the defendant has

¹ *Moshier v. Utica & S. R. R. Co.*, 8 Barb. 427; *State v. Morris Canal & B. Co.*, 22 N. J. L. 537; *Regina v. Inhabitants of Heage*, 2 Q. B. 128; see 1 Mod. 112; 1 Str. 181; 5 A. & E. 765; 1 Russ. Cr. 357.

² *Campbell v. Seaman*, 63 N. Y. 568.

occupied the premises. The prohibition of the use of coal by the defendant was of great damage to him, and substantially destroyed the value of defendant's property as a brick-yard. It is very valuable, and capable of producing from three to four millions of brick annually, at a good profit to the defendant.

Upon these facts the Court of Appeals held, that "the general right of property has its exceptions and qualifications. It does not mean that one must never use his own, so as to do no injury to his neighbor or his property. Such a rule could not be enforced in civilized society. Persons living in organized communities must suffer some damage, annoyance, and inconvenience from each other. For these they are compensated by all the advantages of civilized society. If one lives in the city he must expect the dirt, smoke, noisome odors, noise and confusion incident to city life. But every person is bound to make a reasonable use of his property so as to occasion no unnecessary damage or annoyance to his neighbor. What is a reasonable use of his property cannot be defined by any certain general rules, but must depend upon the circumstances of each case. A use of property in one locality, and under some circumstances, may be lawful and reasonable, which, under other circumstances, would be unlawful, unreasonable, and a nuisance. To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient. Within the rules thus referred to, that defendant's brick burning was a nuisance to the plaintiffs cannot be doubted. Here the remedy at law was not adequate. The mischief was substantial, and within the principle laid down in the cases before cited, and others to which our attention has been called, irreparable. How can one be compensated in damages for the destruction of his ornamental trees and the flowers and vines which surround his home? How can a jury estimate their value in dollars and cents? The fact that trees and vines are for ornament and luxury, entitles them no less to the protection of the law. Every one has the right to surround himself with articles of luxury, and he will be no less protected than one who provides himself with articles of necessity. The law will protect a flower or a vine as well as an oak."

The cases cited in Mr. Justice Earl's opinion, before quoted, are among others, *Attorney-General v. Cleaver*, *Donald v. Humphrey*,

¹ *Walter v. Selfe*, 4 Eng. L. & Eq. 18; *Attorney-General v. Cleaver*, 18 Vesey, 210; *Donald v. Humphrey*, 14 Fed. R. (S. C.) 1206; *Pollock v. Lester*, 11 Hare, 266; *Hole v.*

Hole v. Barlow, Beadmore v. Treadwell, Huckenstein's Appeal to the effect that brick burning is not a nuisance *per se*, but is a lawful, useful and necessary employment near to towns and cities, and yet subject to restraint; and of cases analogous in their decision to the one under consideration, Walter v. Selfe, Beadmore v. Treadwell, Catlin v. Valentine, Whitney v. Bartholomew, Crump v. Lambert, Cook v. Forbes, Broadbent v. Imperial Gas Company, Ross v. Butler, Wier's Appeal, Barnwell v. Brooks, and many others, carefully reviewing the distinctions made and rules affirmed in them. This case comprehends much that can be said on the subject of offensive trades and such nuisances as it describes. Others, however, spring up and new complications of advantages, injuries, obligations and rights, both public and private, are to be adjusted in like manner as before, where, for instance, such a potent agency as electricity is harnessed daily to new uses,¹ and must be made to feel the bridle of the law.

Barlow, 4 C. B. (N. S.) 336; Beadmore v. Treadwell, 81 L. J. (N. S. Q. B.) 877; Huckenstein's Appeal, 70 Pa. St. 102; Catlin v. Valentine, 9 Paige, 575; Whitney v. Bartholomew, 21 Conn. 218; Cook v. Forbes, L. R., 5 Eq. Cas. 166; Crump v. Lambert, L. R., 3 Eq. Cas. 409; Brady v. Weeks, 3 Barb. 156; Wier's Appeal, 74 Pa. St. 206; Ross v. Butler, 19 N. J. E. 294; Broadbent v. Imperial Gas Co., 7 DeG., McN. & G. 436; Barnwell v. Brooks, 1 Law Times (N. S.), 454.

¹ A recent writer has said: "Fire, water, poisons, filth, explosives have all been brought within the principle of Rylands v. Fletcher, and now there must be added to the "wild-beast" list, electricity; and rightly, for is not this mysterious current of all dangerous and destructive forces known to science the strongest, swiftest, subtlest? Among other eccentricities it has the property, it seems, when discharged into the ground by a tram company, of paralyzing a neighboring telephone system and converting the messages into inarticulate murmurs, a fact which has already been discovered in America. This is certainly a grievance, for inaudibility is a distinct defect in a telephone; but it is no use having a grievance if the author of the nuisance is only doing, without negligence, as the tram company in this case was, what the legislature has authorized him to do." London Quarterly Review, 48 Alb. L. J. 297; Nat. Tel. Co. v. Baker, 68 L. T. (N. S.) 283; Hudson R. Tel. Co. v. Water-vliet T. & R. R. Co., 185 N. Y. 398. This case holds: The immunity from liability of a corporation, exercising a power or privilege conferred by law for the public benefit, for a private injury, where the damage sustained is the result of the proper exercise of the power or privilege, "does not extend to acts which are *ultra vires*, or to those which are equivalent to a confiscation or condemnation of property rights, unless provision is made for due compensation. Accordingly held, that said company, having obtained the consent of the common council of the city of Albany, was authorized to adopt and use what is known as the single trolley system of electrical propulsion, it appearing and having been found that it is the best system thus far devised, and is not prejudicial to public health or dangerous. The primary and dominant purpose of a street being for public passage, any appropriation of it by legislative authority to other objects will be deemed to be in subordination to this

use, unless a contrary intent is clearly expressed. The fact that inconvenience or loss results to one having no easement in a street from the adoption of a mode of locomotion authorized by law, which is carefully and skillfully employed, and which does not destroy or impair the usefulness of the street, does not, in the absence of a statute imposing a liability, give a right of action. Also held, the fact that plaintiff's system of communication was only partially established in the public streets, its telephones being located and its wires grounded upon private property, and that defendants' method permitted the electric current, used to propel its cars, to escape and flow to plaintiff's grounded wires, thus inflicting serious loss, did not give a right of action, as the use of its grounded wires was a part of its system of telephonic communication through the streets which it maintains under the permission of the State and subject to the condition that it shall not incommode the use of the streets by the public; that its franchise was indivisible and entirely subservient to the lawful uses of the streets for public travel; that having accorded to the public an unrestricted right of passage, it could not question the form in which that right is enjoyed, so long as it is lawful and is utilized with proper care and skill." As to injuries to travelers on the highway from electric wires, *Bourget v. Cambridge*, 156 Mass. 391; *Graham v. Boston*, 156 Mass. 75.

CHAPTER X.

REMEDIES IN NUISANCE CASES.

The abatement of a nuisance is conditioned upon the right to a remedy.¹ Private injury, as we have seen, may be *damnum absque injuria*, and this has been held to extend in a particular case to a public nuisance, as, for example, where a great public improvement is authorized. In one case, at least, it was the opinion of the court that this was a sufficient defense, where it occasioned an obstruction of flowing water, and rendered thereby a locality unhealthful. Often the question of a particular remedy is indissolubly connected with that of the nuisance complained of either on the part of the people or the private citizens. It is one of the issues of trial. When the right has been exercised, it may be the subject of determination in actions for damages which follow. Much learning has been expended in judicial opinions, as well as in text-books, on the proper remedies to be adjudged for nuisances of every class and form. Some examination of them is, therefore, necessary.

The N. Y. Court of Appeals in 1890, in *Lawton v. Steele*, said in the opinion, concurred in by all the justices sitting, "The public remedy is ordinarily by indictment for the punishment of the offender wherein, on judgment of conviction, the removal or destruction of the thing constituting the nuisance, if physical or tangible, may be adjudged, or by bill in equity filed on behalf of the people. But the remedy by judicial prosecution *in rem* or *in personam* is not, we conceive, exclusive, where the statute, in a particular case, gives a remedy by summary abatement, and the remedy is appropriate to the object to be accomplished." * * * But the remedy by summary abate-

¹ *Ft. Plain Bridge Co. v. Smith*, 30 N. Y. 44; 2 Wh. Cr. L., § 2864; *Com. v. Reed*, 10 Casey (Pa.), 275; *Wetmore v. Story*, 22 Barb. 414. It were better to take Judge McLean's apothegm in its largest sense. 5 How. 504. "A nuisance may be abated. Every thing prejudicial to the health or morals of a city may be removed." 119 N. Y. 236. Damages for the destruction of a bawdy house. *Moody v. Bd. of Supervisors*, 46 Barb. 660; 36 N. Y. 297; 36 Barb. 532.

² 119 N. Y. 237; see remark of Judge Cowen, quoted 37 Barb. 309: "I am aware of no cases denying that the remedy by abatement is, in all respects, concurrent with

ment cannot be extended beyond the purpose implied in the words, and must be confined to doing what is necessary to accomplish it." In another passage this opinion concludes that the right of summary abatement of nuisances without judicial process or proceedings, was an established principle of the common law long before the adoption of our Constitution, "and it has never been supposed that this common-law principle was abrogated by the provision for the protection of life, liberty, and property in our State Constitution." * * * "The general proposition has been asserted in text-books and repeated in judicial opinions that any person may abate a public nuisance. But the best-considered authorities in this country and England now hold that a public nuisance can only be abated by an individual where it obstructs his private right or interferes at the time with his enjoyment of a right common to many, as the right of passage upon the public highway, and he thereby sustains a special injury." It is with remedies obtained through public action or through the courts that we have to do. The public nature of the prosecution for public nuisances has been so sedulously preserved and the quality of relief so important that the presence of the Attorney-General has been sometimes required.

In *People v. Vanderbilt* the New York Court of Appeals held that the remedy to prevent the erection of a purpresture and nuisance in a bay or navigable river is, by injunction, at the suit of the Attorney-General.¹ In *Newark Aqueduct Board v. Passaic* the same doctrine was held in New Jersey. In *Sampson v. Smith*, where the plaintiff in Leicester Square, London, complained of a smoke nuisance from defendant's chimney, which was much lower than the tops of the chimneys of adjoining houses, and the body of smoke, "black and soot mingled therewith," descended in such dense masses into the street that the shop and house of the plaintiff was filled, his goods and furniture injured and the health and comfort of himself and family prejudiced, there was a demurrer to the bill generally, and for want of parties. The defendants argued that in cases of public nuisances an

that by indictment," and Judge Allen's careful discrimination, *id.* 310; *Benwick v. Morris*, 7 Hill, 575. A bridge built under authority of a public act, but "so as to obstruct navigation," held a public nuisance and liable to abatement *pro tanto* by any one."

¹ 28 N. Y. 396; 45 N. J. Eq. 393; *Attorney-General v. Cleaver*, 18 Ves. 211; *Sampson v. Smith*, 8 Sim. (Eng. Ch.) 272; *Knickerbocker Ice Co. v. Shultz*, 116 N. Y. 332. The court says of an alleged purpresture, a dike in the Hudson river, "it seems those questions can only be determined in an action at the suit of the People."

injunction ought to be filed by the Attorney-General, or at all events he must be a party, and the Vice-Chancellor at first was inclined to their view,¹ saying that the bill alleges so much of a general nuisance that I entertain some doubt whether the Attorney-General ought not to be a party, but on reflection he overruled the demurrer, giving as reason therefor: "In a case so constituted I do not see, if the Attorney-General were a party, that I could make a decree which would bind the question between the defendant and the public." This view is supported by such authority in this country as the United States Supreme Court in Fifth Baptist Church case. It never was a general requirement, but the motive to protect the public interest was constantly maintained and many actions have been authorized by private parties directed against nuisances which have a public character.²

In *Rex v. Wook* it was said: "As an indictment for keeping a gaming-house is for a public nuisance and not for any matter in the nature of a private injury, if the prosecutor forbears bringing the case to trial, another person may proceed with the indictment."³ In a similar case, where the prosecution had been discontinued, the court directed the Attorney-General to proceed. The observation of Mr. Justice Mellor, in the *Queen v. Stephens*, explains the theory of the form of proceedings, and also of the judgments in Nuisance cases, as follows: "It is quite true that this, in point of form, is a proceeding of a criminal nature, but, in substance, I think it is in the nature of a civil pro-

¹ 108 U. S. 329. An indictment for cursing and quarreling in a loud voice in a public place, whereby a singing school was broken up *ad commune nocumentum*, was not sustained as for a common nuisance. *State v. Baldwin*, 1 Dev. & Bat. 195; but see 2 Wh. Cr. L., § 2362, and a parallel case maintained, *Barker v. Com.*, 7 Harris, 412.

² See *Attorney-General v. Castleford Local Board of Health*, 6 Ch. App. Cas. 853, a suit, by information and bill, to restrain Castleford Board of Health from allowing sewage to pass into the river Aire, the Earl of Mexborough being relator and plaintiff. In *Attorney-General v. Earl of Lonsdale*, L. R., 7 Eq. Cas. 390, the Vice-Chancellor holds that "the suit is properly constituted for the purpose of preventing the continuance of the public and private injury of which the Attorney-General and the plaintiff complain. The plaintiff might, perhaps, have maintained the suit without the Attorney-General, on the principle of *Spencer v. London & Birmingham R. Co.*, and cites 8 Sim. 193, and 2 L. R., 6 Eq. Cas. 177."

³ *Rex v. Wook*, 3 B. & Ad. 657; 1 Russ. Cr. 323; *Rex v. Oldfield*, id., note a; *Rex v. Fielden*; *Rex v. Constable*, id. However desirable, this would be a difficult procedure in the State of New York, where the Court of Appeals has refused to recognize appearances for the People. *Matter App. Mayor, etc., of New York*, 99 N. Y. 569-584; *People, ex rel. Sherwood*, 129 N. Y. 373; see *contra*, *Boyd v. Nebraska*, U. S. Sup. Ct., Feb. 1, 1892, 143 U. S. 135.

ceeding, and I can see no reason why a different rule should prevail with regard to such an act as is charged in this indictment between proceedings which are civil and proceedings which are criminal. I think there may be nuisances of such a character that the rule I am applying here would not be applicable to them, but here it is perfectly clear that the only reason for proceeding criminally is that the nuisance, instead of being merely a nuisance affecting an individual, or one or two individuals, affects the public at large, and no private individual, without receiving some special injury, could have maintained an action."

The master of Castle quarry¹ was held liable for the acts of his workmen in carrying on the works, though done by them without his knowledge and contrary to his general orders. The rubbish from the quarry was stacked near the edge of the river Tivy, a navigable stream which flows past the town of Cardigan to the sea. Previous to 1847, the defendant erected a wall to prevent it from falling into the river, but in that year a heavy flood carried away the wall and with it large quantities of rubbish. Quantities of additional rubbish were from time to time shot down by the defendant's workmen on the same spot, and so slid into the river. By these means the navigation was obstructed, so that even small-boats were prevented from coming up to Llechryd bridge, to which point, twenty years before, the stream was navigable. Mr. Justice Blackburn instructed the jury that the defendant would be liable for the acts of his workmen, in depositing rubbish from the quarries so as to become a nuisance, though without the defendant's knowledge, and against his orders. This ruling was sustained on the appeal.

In *Russell on Crimes*,² we see that it is also stated, as the better opinion, that the Court of King's Bench may, by a mandatory writ, prohibit a nuisance, and order that a party disobeying such writ shall be subject to an attachment. Such writs appear to have been granted in some cases, and the proceeding in one case was that the judges, upon view, ordered a record to be made of the nuisances, and, sending for the offender, ordered him to enter into a recognizance not to proceed, but he refusing to comply, the court committed him for the contempt, issuing a writ to the sheriff on the record made to abate the buildings, and ordered the offender to be indicted for the nuisance. And Hale,

¹ Eng. L. R., 2 Q. B. 702 (1866), *Queen v. Stephens*.

² Russ. Cr. 827; Bacon Abr., Nuisances, C.; *Rex v. Hall*, 1 Mod. 26; Ven. 169, S. C.; *Ex parte Marsh*, 57 Fed. R. 719.

C. J., mentioned another case of a writ to prohibit a bowling-alley erected near St. Dunstan's Church. But the more usual course of proceeding in cases of nuisance is by indictment. This form of judgment, that the defendant remove the nuisance at his own cost, and that he be committed until the sentence be complied with, and in case of neglect, that the sheriff be commanded to abate the nuisance in his place, was examined at some length by the Pennsylvania Supreme Court, in *Taggart v. Commonwealth*. The defendant was convicted of placing a nuisance in the public street, and sentenced to abate it at his own cost and to stand committed until the sentence was complied with. It was argued that the nuisance should be abated by means of a writ directed to the sheriff. The sentence was supported in the opinion of Mr. Justice Lewis, by authorities drawn from somewhat ancient law, including Rolle's Abridgment, and the declaration there found, "*si homo soit convict d'un nusans fait al haut chemyn le Royil serra command per le judgment a remover le Nusans a son costs demesne.*"

Sir Charles Sedley's case affords another illustration of this power of the law courts.¹ In the city of New York, in August, 1878, on four indictments for nuisances against Coe, Clark & Preston, the proprietors of four factories for the manufacture of fertilizers, and the treatment of refuse matter with sludge acid, at Newtown Creek, in Queens county, whereby offensive, injurious, and unwholesome odors were diffused, which, borne by easterly winds, pervaded certain portions of New York, endangering the public health of that city, after conviction of one of the defendants, and pleas taken from the others, bonds were required in \$5,000 for the abatement of the nuisance and the removal of the factories. Four factories were removed in consequence of the judgment in the case.² The evidence was obtained, and the prosecution was undertaken at the instance of the Board of Health of New York.

If a party who has been indicted for a nuisance continue the same, he is again indictable for such continuance. The caution interposed in case of summary abatement of nuisances in public highways, applies generally. "Though a party may remove the nuisance, he cannot remove the materials, or convert them to his own use, and so much of

¹ 9 Harris, 527; 2 Wh. Cr. L. 2369; 2 Rolle's Abr. 84, § 15.

² 1 Russ. Cr. 381.

³ N. Y. L. 1851; chap. 415, N. Y. City Cons. Act, § 1441.

the thing only as causes the nuisance ought to be removed.¹ If a ship or other vessel sink, by accident, in a river, although it obstruct navigation, if the owner removes it in a reasonable time it is not indictable as a nuisance. In respect to highways, it is said "the object of the prosecution is to remove the nuisance, and to that end alone the sentence is generally directed. It is, therefore, usual when a nuisance is stated as continuing, in addition to a fine, to order the defendant, at his own costs, to abate the nuisance."

It has been ruled that where a vessel has been sunk in a navigable river by accident and misfortune, no indictment can be maintained against the owner for not removing it, and Lord Kenyon, C. J., said, in the case cited, that "the grievance had been occasioned, not by any default or willful misconduct of the defendant, but by accident and misfortune; and it would be adding to the calamity to subject the party to an indictment for what had proceeded from causes against which he could not guard, or which he could not prevent; and, though it was urged, that if the defendant was not punishable for having caused the nuisance, yet it was his duty to have removed it, and that he was liable to be indicted for not having done so; perhaps the expense of removing the vessel might have amounted to more than the whole of the property; he was, therefore, of opinion that the offense was not the subject of indictment."

The mandatory form of judgment, however, in equity, has come to be very largely used. Its growth and the application to nuisances is interesting. As was said by Mr. Justice Earl in *Campbell v. Seaman*: "A suit at law is no longer a necessary preliminary, and the right to an injunction in a proper case, in England and in most of the States, is just as fixed and certain as the right to any other provisional remedy. It is a matter of grace in no sense, except that it rests in the sound discretion of the court, and that discretion is not an arbitrary one. If improperly exercised in any case, in granting or refusing it, the error is one to be corrected on appeal." Mr. Justice Swayne, in the *Parker*

¹ 4 Sharswood's Blackst. Com., 167, note; 8 T. R. 143; *Id.* Dalt., chap. 50; 9 Rep. 58; God. 221-2; 2 Str. 686; *Id.*, 2 Esp. 675; Hawk. b. 1, c. 7, 5, § 12.

² 1 Russ. Cr. 383; *Rex v. Watts*, 2 Esp. 675.

³ 63 N. Y. 582; *Corning v. Troy I. & N. Co.*, 40 N. Y. 191; *Parker v. Winnipiseogee L. C. & Wo. Co.*, 2 Black (U. S.), 545; *Attorney-General v. United Kingdom Tel. Co.*, 30 Beav. 287; *Clowes v. Staffordshire Potteries Co.*, L. R., 8 Ch. App. 125. An interesting case in which the question was raised of the remedy by action, and the complaint was of fouling the river Churnet to such an extent as to be injurious to the

case cited by Judge Earl, says the concurrent jurisdiction of courts of equity dates back to an early period. "It has been greatly enlarged since the time of Lord Thurlow. Many cases of private nuisances will sustain an action of law which will not justify relief in equity. A court of equity will interfere when the injury by the wrongful act of the adverse party will be irreparable, as where the loss of health, the loss of trade, the destruction of means of subsistence, or the ruin of the property must ensue."

Salvin v. North Brancepeth Coal Company was for a mandatory injunction, and the opinion of Sir W. M. James, quoted from in *Campbell v. Seaman*, indicates the different rules which prevail in a different age and in a locality whose surroundings have changed, by the observation that "it would have been wrong, as it seems to me, for this court, in the reign of Henry VI, to have interfered with the further use of sea coal in London, because it had been ascertained to their satisfaction, or predicted to their satisfaction, that by the reign of Queen Victoria both white and red roses would have ceased to bloom in the Temple gardens." In *Blakemore v. Glamorganshire Canal Co.*, in 1832,¹ the precedents were discussed of equity relief, by an order in such form indirectly to compel some positive act to be done by the party enjoined, as well as the principles applicable to the construction of acts of Parliament establishing public companies with extraordinary powers for the execution of works of local or general utility, and the conclusion was reached that the leading principle to be the guide of the court and to limit its discretion in granting injunctions, at least where no very special circumstances occur, is that only such a restraint should be imposed as may suffice to stop the mischief complained of.

In 1836, in *Spencer v. London & Birmingham Railway case*,² the Vice-Chancellor says: "The power of the court to grant that species of injunction which Lord Eldon granted, namely, restraining a party from allowing a thing to continue, and which has the effect of making him take some active measures, has been since recognized and acted on, and I do not see why, if a species of negative injunction has been adopted, it should not be adopted here, so as to prevent the parties

plaintiff's dye-works. The defendant had special powers to take and store waters and to discharge into said river. *Salvin v. North Brancepeth Coal Co.*, 9 Ch. App. Cases, 708-709.

¹ 7 Eng. Ch. 154, 167, 182.

² Eng. Ch. R.; 8 Sim. 194-8; 29 Eng. Ch. 133; *Earl of Mexborough v. Bower*, 7 Beav. 127.

from continuing the excavation in its present state ; with respect to the nature of the grievance, all the inhabitants of Granby Mews, as it appears to me, suffer a species of injury quite distinct from that done to his Majesty's subjects in general." In 1843, in the *Earl of Mexborough v. Bower*, the Master of the Rolls says : "The motion asks for something more than ordinary, namely, to restrain the defendants permitting water to flow through the communication (between mines). It is, however, no unusual thing to ask an injunction in this form."

In *Attorney-General v. Colney Hatch Lunatic Asylum*, in 1868, there was an information filed at the relation of the local Board of Health of Edmonton, in the name of their clerk, against the Committee of Visitors of the County Lunatic Asylum at Colney Hatch, praying for an injunction to restrain the defendants from causing or permitting any sewage or gas water to flow into a stream called Pymms brook, so as to be a nuisance to the public health. The Lord Chancellor said : "Cases like the present, no doubt, show the difficulty in which persons who are desirous of getting rid of refuse sewage are constantly placed, but it is a difficulty which must be met, not by applying to a court of law to escape from the exigencies of the condition in which they find themselves, but by an application to the legislature. Now, I believe the court will always find that its simplest course, as far as regards the administration of justice, is to ascertain the exact state of law which regulates the relations of the parties ; and, having done so, to proceed to act on it, without any reference to the difficulties of the case on the part of those against whom it is obliged to decide.

It was asked : "How can visiting magistrates be made answerable now for that which was done by their predecessors fourteen or fifteen years ago, and how are they to redress the wrong then done. The simple answer to this is, it is a continuing wrong, and moreover as these unfortunate inmates are persons having no control over their own acts, and they and all the officers of the asylum are placed under the control of visiting magistrates, the visiting magistrates must be responsible for their acts. There would be no nuisance if these persons did not daily commit it." Something was also said on the ground of delay. "As regards delay, the case stands thus. This course of proceeding, if not actually commenced, was sufficiently indicated in 1852, and thereupon the clerk to the local Board of Health of Edmonton immediately called the attention of the magistrates to this evil, and, from time to time, attempts were made by the magistrates, most properly, by a variety of contrivances, to remove it. They tried dis-

infecting fluid; they sent persons to Stroud to see what was done there; they dug a well one hundred and twenty feet deep; they tried filtering beds, and other things of the kind. This court would be very loth to say that a public body should rush at once into a chancery suit in dealing with another public body. It appears to me the delay must count for nothing, and when the relators filed this information in 1865, they were quite in time." Another point was raised, that the relators, who are the local Board of Health, might do all, they are calling on the defendants to do. "They allege that it was the duty of the Board of Health of Edmonton, when they found a nuisance coming into the district, to prepare a sewer which would carry off and remove the nuisance. Beyond that, they had power, by a recent act of Parliament, to communicate with the neighboring Board of Health of Tottenham, and with the assistance of them, also, to carry off the sewage through Tottenham, and so remove all that had been created. But, in the first place, although it may be the duty of the Board of Health to remove every evil which cannot otherwise be removed, I apprehend it *is no part of their duty to create expense in order to remove a nuisance imported wrongfully into their district*, for which they have a much more easy and proper remedy, namely, the remedy of preventing the evil from recurring."

This opinion is concurred in, and, also, that it is no part of the duty of the court to inquire into what way the defendant can best remove the nuisance, but the defendant must find his own way out, whatever inconvenience or expense it may put him to, unless the removal of the injury is physically impossible. But when the difficulty of removing the injury is great, the court will suspend the operation of the injunction for a time. Such an order of injunction was granted, and *Goldsmith v. Tunbridge Wells Improvement Commissioners*, and *Attorney-General v. Heath*, were cited as precedents.¹ The argument and decisions thus set forth in this very carefully considered case, interest us particularly, because reported cases are few; but the experience is constant in sanitary administration, especially of cities, of these same objections.

In *Attorney-General v. Cockermouth Local Board*, the pollution of the river Derwent, from which the town of Workington at the mouth

¹ *Atty.-Gen. v. Colney Hatch L. Asylum*, L. R., 4 Ch. App. Cas. 161; L. R., 1 Eq. Cas. 161; 1 Ch. 349; *Atty.-Gen. v. Terry*, 9 Ch. App. 423 (1874). An obstruction in a river restrained at the suit of a municipal corporation empowered to remove obstructions. *Atty.-Gen. v. Cockermouth*, L. R., 18 Eq. Cas. 172; *Schrivver v. Village of Johnston*, 54 N. Y. St. R. 578; *City of Jacksonville v. Doan*, 145 Ill. 23.

of the river derived its water supply, by sewage from Cockermouth, eight miles higher up the same stream, was complained of. The local board of this town discharged its sewage by an outfall out of their district, so as to pollute the water at the point of discharge, but this was imperceptible at the town of Workington. The court held that in an action to restrain the transgression of powers conferred by an act of Parliament, it was not necessary to prove that injury to the public will result from the acts complained of, and in this respect there was no difference between an *ex-officio* information, and an information at the relation of a private citizen. The court says: "The legislature is of opinion that certain acts will produce injury and that is enough. The legislature is of opinion that it is desirable to preserve our streams in at least their present purity; it, therefore, has said, you shall not affect or deteriorate the water at all, and the court must assume that the deterioration of the water is an injury which is prohibited for good and sufficient cause." An injunction was, therefore, granted. The nuisance could not be proved, and on that allegation the bill was dismissed, but the Master of the Rolls said the meaning of the statute was plain, "that you shall not send your sewage water into a natural stream until you have made it wholesome water," and the privilege of an outfall granted to the defendants was on these terms.

In *City v. Ohio Railroad Company*, the city of Moundsville, W. Va., filed a bill against the railroad company praying a mandatory injunction, and the court considered at some length the questions of this remedy and its application. A license had been granted by the city council to the defendant to build its road upon a public street, and conditions imposed by the city ordinance requiring sewers and street crossings to be built or rebuilt so as to restore the street to its usefulness to the public and to be kept in repair, were argued against, as beyond the powers of the contracting parties, but the decree below awarding the writ was affirmed. The court said: "At one time the mandatory injunction, because injunctions had always been couched in prohibitory language, was framed in that form only, by prohibiting the doing or continuing to do a given thing, thereby compelling the party to do the thing which it was desired he should do, because by continuing to do as he had done, he became liable to punishment, but in later times this species of injunction has lost this delicacy, and now when used assumes the form of command to do a specific act. So it being a public nuisance equity has jurisdiction. True we find it laid down that equity has no jurisdiction in cases of public nuisance, where

a complete remedy exists at law, but so large and widely used is the jurisdiction in public nuisances that it is hard to exclude it in any case, and the statement in Beach's Modern Equity Jurisprudence is substantially correct nowadays, that "notwithstanding the legal remedies for a public nuisance, equity will interpose by injunction in a proper case where the nuisance is of a permanent character," as in this case. Here the remedy needed by the complainant is one which shall judicially determine whether the defendant has complied with its obligation or duty, and if it has not, then to abate the nuisance by requiring a cessation of the present state and the performance of the company's duty.¹"

"In Massachusetts it has been held that a town may go into equity to test whether a railroad company has performed its obligation to restore a road, and that, as an incident, there may be, upon decree in its favor, a mandatory injunction for performance." Such was this case. The court had jurisdiction to adjudicate upon the question whether the company had fulfilled its obligation, and, if not, to make an order that it do so. Really, as is said in Comyn Equity Jurisprudence, it is in no sense an injunction, though called a "mandatory injunction," but an order for abatement of nuisances. Courts of equity exercise a very salutary jurisdiction in matters of nuisance to adjudge the question of nuisance and abate them. The remedy by *mandamus* would be likely adequate, but is more formal, and not as flexible as that in equity. In *mandamus* the judgment would be final and inflexible, whereas equity possesses a capacity to modify its order to suit changing circumstances, and is, if there is any difference, more adequate and complete a remedy than *mandamus*."

Potent reasons were given for this enlarged use of injunction in nuisance cases, in the opinion of Sir G. Mellish, L. J., on the appeal in *Clowes v. Staffordshire Potteries Water Co.* in 1872, when, in reversing the decree below, it was held that the grants to the defendant

¹ W. Va. Ct. App., Nov. 26, 1892, 37 W. Va. 92; 2 B. Mod. Eq. Jur., § 743; 3 Comyn's Eq. Jur., § 1359; *Keystone Co. v. Summers*, 13 W. Va. 746; *State v. N. E. R.*, 9 Rich. Law, 247; *Indianapolis R. Co. v. State*, 37 Ind. 489; *People v. Chicago R. Co.*, 67 Ill. 118; 2 Dill. on Mun. Corp., § 708, note; High Extr. Rem., §§ 819, 820; 35 Minn. 181; 37 Me. 451; 7 Metc. 70; 33 Kans. 176; 26 Ga. 665; 45 Texas, 88; 24 N. J. Eq. 217; *In re Trenton Water Power Co.*, 20 N. J. L. 659; *Clowes v. Staffordshire W. W.*, 8 Ch. App. Cas. 142. As to action at law for damages, the legislature not having conferred authority to maintain a nuisance, see 108 U. S. 334, 335. *Resort to equity to prevent continuance of the trespass and multiplicity of suits — Pappenheim v. Met. E. R. R. Co.*, 128 N. Y. 486.

gave it no power to foul the water; that the corporation clauses in the Water-Works Act of 1847 did not apply, inasmuch as the injury was such as the company was not authorized to commit, and that the plaintiff was entitled to an injunction. "Under the old practice several actions would have been necessary, and the decision states it is because it is most inconvenient to have the rights of parties determined in that way, and in fact impossible to have it in that way, that this court has always given relief. In my opinion, therefore, the plaintiff is entitled to maintain this suit, and is entitled to have a declaration that the acts of Parliament have not given the defendants any legal rights to foul the water to her damage, and ought to have an injunction to prevent such damage in the future."

The remedies now most commonly used against nuisances are complaints to the proper authorities for the ordinary class of misdemeanors; infractions of police laws, building laws, or ordinances and regulations duly established, or fitted to the occasion by a board of public officers or magistrates; on application to the nearest police court by affidavits for a warrant, or by injunction in the first instance. The right to apply for such a writ is often a part of the grant of powers in health and other regulative laws passed under the police powers.

In the legislation for the city of New York, examples are to be found in the Health Law of 1866, in the Building Department Laws, and in the Plumbing Bill of 1881.¹ In the Health Department of the City of New York v. Patrick H. Lalor,² the syllabus is as follows: "The plaintiff, who owned a plot of ground at the north-east corner of Lexington avenue and One Hundred and Twenty-second street, in New York city, filed with the Board of Health, as required by chapter 450 of 1881, a plan of the plumbing and drainage of a row of seven houses which he proposed to erect upon the said lots. As there was no public sewer in Lexington avenue, he proposed to carry his drainage under the yards in the rear of the houses to the public drain in One Hundred and Twenty-second street. The Board of Health approved his plan, but added thereto, "on condition that the private sewer from said houses to One Hundred and Twenty-second street sewer be laid under the roadway of the avenue and not through the yards or cellars of the houses." After vain efforts to procure a modification of this proviso, he made the connection through the yards as he had at first proposed,

¹ See N. Y. City Cons. Act of 1862, §§ 645, 506, 1089.

² 88 Hun (January, 1896), 542, Health Dept. v. Lalor.

alleging, as a reason for so doing, that the method adopted by the Board of Health was unnecessarily expensive, and not absolutely necessary for the preservation of the public health. Held, that a judgment restraining the defendant from executing the plumbing and drainage in violation of the said provision inserted by the Board of Health was proper and should be affirmed."

Special remedies are not infrequently founded upon local laws. Tenement and lodging-houses have long been a subject of police regulation, and even in the days of the Cæsars in Rome, the well-being of the great habitations, teeming with crowded people, were a matter of public concern. In the city of New York, where little of the irksome duty of the policing the city is required of the police proper, in comparison with foreign cities, the difficulty of finding a responsible owner, or a responsible defendant, in an action against a tenement-house, led to a procedure *in rem* against the house, which has had the happy issue, in every case of its use, to discover a responsible owner *in personam* within twenty-four hours, and is as follows:¹ "Whenever it shall be certified to the Board of Health of the Health Department of the city of New York, by the sanitary superintendent, that any building, or part thereof, in the city of New York, is infected with contagious disease, or by reason of want of repair has become dangerous to life, or is unfit for human habitation because of defects in drainage, plumbing, ventilation, or the construction of the same, or because of the existence of a nuisance on the premises, and which is likely to cause sickness among its occupants, the said Board of Health may issue an order requiring all persons therein to vacate such building, or part thereof, for the reasons to be stated therein as aforesaid. Said board shall cause said order to be affixed conspicuously in the building, or part thereof, and to be personally served on the owner, lessee, agent, occupant, or any person having the charge or care thereof; if the owner, lessee or agent cannot be found in the city of New York, or do not reside therein, or evade or resist service, then said order may be served by depositing a copy thereof in the post-office in the city of New York, properly inclosed and addressed to such owner, lessee or agent, at his last-known place of business or residence, and prepaying the postage thereon; such building, or part thereof, shall, within ten days after said order shall have been posted and mailed as aforesaid, or within such shorter time, not less than twenty-four hours, as in said order may be

¹ N. Y. City Cons. Act of 1882, § 659; L. 1887, chap. 908, § 11.

specified, be vacated, but said board, whenever it shall become satisfied that the danger from said building, or part thereof, has ceased to exist, or that said building has been repaired so as to be habitable, may revoke said order."

Parties defendant may include public officers and boards of officers.¹ Corporations and public officers may be indicted for nuisances and violations of duty, and masters are held for the acts of their servants in the line of their employment. An indictment lies against officers in a corporation for neglecting to do what the common good requires. For the repair of highways and bridges, many such actions are reported in England. In the United States, more frequently, proceedings are taken under the Highways Acts, and responsibility is enforced by civil actions.

In *The Mayor v. Furze*, Chief Justice Nelson, in the opinion of the court, holds that: "Where a public body or officer is clothed by statute with power to do an act which concerns the public interest, or the rights of third persons, the execution of the power may be insisted on as a duty, though the statute creating it be only permissive in its terms."

This is put more strongly in *The People v. Board of Supervisors of Otsego County*. "Where a statute provides for the doing of an act for the sake of justice, or where it clothes a public body or officers with power to do an act which concerns the public interest or the rights of individuals, though the language may be permissive merely, it will be construed as imperative, and the execution of the power may be insisted upon as a duty." In *Robinson v. Chamberlain* it was held

¹ *Smith on Master and Servant*, 181; *Queen v. Stephens*, L. R., 2 Q. B. 702; *Rex v. Medley*, 6 C. & P. 29; *Noy's Maxims* C. 44; *Rex v. Dixon*, 3 M. & S. 11; *Salt Lake City v. Hollister*, 118 U. S. 256, and cases cited; *Denver & R. G. R. v. Harris*, 123 U. S. 597; *Pettengill v. City of Yonkers*, 118 N. Y. 559; *People v. Albany*, 11 Wend. 539; *State v. King*, 8 Wend. 411; *People v. Lawson*, 17 Johns. 276; *State v. Commissioner*, 1 Walk. 868; 2 Whart. Cr. L. 2408; 1 Russ. Cr. 352, 397; *Rex v. Inhabitants of Netherthorn*, 2 B. & A. 174; *Rex v. The Inhabitants of Oxfordshire*, 4 B. & C. 194; *Rex v. Clifton*, 5 T. R. 498. In this case Lord Kenyon held it was only necessary to serve two of the town with process and the others must reimburse them. *People v. Kingman*, 24 N. Y. 559; *People v. Van Alstyne*, 8 Keyes, 85; *Mayor v. Furze*, 3 Hill, 612; *People v. Stocking*, 50 Barb. 573; *Clapper v. Town of Waterford*, 181 N. Y. 883; *Wetmore v. Tracy*, 14 Wend. 250. Common law remedies remain, notwithstanding statutory provisions for removing encroachments from public highways.

² *People v. Board of Supervisors of Otsego County*, 51 N. Y. 401; *Robinson v. Chamberlain*, 84 N. Y. 889; *Megargee v. City of Philadelphia*, Sup. Ct. Pa., Feb. 20, 1898, 25 Atl. R. 1130; *Gold v. City of Philadelphia*, 115 Pa. St. 184.

that "one, who by contract with the State assumes the duties and is invested with the powers of a public officer, is liable to an individual who sustains special damage by a neglect properly to perform said duties. A public officer or a contractor engaged to perform the duties of a public officer, is liable for the negligence or malfeasance to any one sustaining special damage in consequence thereof."

In *Cain v. The City of Syracuse*, the New York Court of Appeals while affirming a judgment in favor of the defendant, and remarking that "a different rule would almost make every municipal corporation the responsible guarantor to the individual citizen, of the absolute safety of every wall, building and structure standing within the corporate limits," yet goes on to say, "municipal corporations accepting chartered powers from the State, and so, by their own consent, assuming duties not previously imposed, become liable, in consideration of the grant, for the due exercise of the powers, and the proper performance of the duties, thus conferred and imposed."

In *Bassett v. Fish*, it is said: "It seems that, as a general rule, where an administrative officer acts contrary to, or neglects to act in accordance with his official duty, and another suffers injury in consequence, an action lies against the officer on behalf of the persons so injured. Such officer is liable for the misconduct or negligence in the scope of their employment of those employed by or under him." The limitations in a review of the discretionary action of the common council in ordinances and resolutions, are also carefully set out in the same opinion.¹ In *City of Rochester v. Campbell*, it is held, "where a new right is created or a new duty imposed by statute, which also gives a remedy for its violation or non-performance, the remedy given is exclusive." In *Dudley v. Mayhew*, Judge Strong, in the opinion of the court, says: "It is very clear that when a party is confined to a statutory remedy he must take it as it is conferred; and that where the enforcing tribunal is specified, the designation forms part of the remedy, and all others are excluded. The remark made by Lord Holt, in *Ewen*

¹ *Cain v. City of Syracuse*, 95 N. Y. 83; *Kiley v. City of Kansas*, 69 Mo. 102; 33 Am. R. 491; *Parker v. Mayor of Macon*, 39 Ga. 725; *Jones v. New Haven*, 34 Conn. 1; *Norristown v. Mayor*, 67 Pa. St. 356; *Bassett v. Fish*, 75 N. Y. 303; *People, ex rel. Loomis, v. Board of Town Auditors of Little Valley*, 75 N. Y. 316; *Hover v. Barchhoff*, 44 N. Y. 113; *Bryant v. Town of Randolph*, 133 N. Y. 70; *Griffin v. Mayor*, 9 N. Y. 459; *Kelly v. City of Milwaukee*, 18 Wis. 85; see *Kurz v. City of Troy*, 104 N. Y. 344; *Pompney v. Village of Saratoga*, id. 459; *City of Rochester v. Campbell*, 123 N. Y. 405; *Dudley v. Mayhew*, 3 N. Y. 9; see 110 N. Y. 374, 379; *Miller v. Taylor*, 4 Burr. 2305; *Ewen v. Jones*, 2 Salk. 415.

v. Jones, that wherever a statute gives a right, the party shall, by consequence, have an action to recover it, is undoubtedly correct when applied to cases where the statute does not give any remedy to the proprietor for an invasion of his property or right."

This distinction is of cases where the remedy is not cumulative, as we have before seen. It is generally respecting a nuisance *per se*, and where the general rule applies, that an affirmative statute does not exclude the common law. In *Flynn v. Taylor*, the court holds that any unnecessary or unreasonable use of a sidewalk or street, to the serious inconvenience of the public, is a nuisance *per se*. It seems, says the court, "a remedy for the wrong against the public may be found in the indictment of the offender (Penal Code, § 385), or in a suit by the proper officer on behalf of the people, to compel him to abate the nuisance. An individual who sustains a special and peculiar loss in consequence of such a nuisance, may maintain an action in equity for damages and injunction."¹

In the relief from one nuisance, another may not be committed. This, we have seen in the *Colney Hatch* case, and in *New York Central and Hudson River Railroad Company v. The City of Rochester*, it is held, that: "A municipality may not empty its sewers upon private property without acquiring the right to do so, and that the owner is not confined to his action for damages, but is entitled to an injunction." Courts will not set off one nuisance against another, or, in determining the rights of the parties, consider the benefits to be acquired, or the comparative loss.² It is equally consistent with the principle of justice which forbids the enforcement of illegal and disgraceful contracts, that immunity should not be sought for the creation of a nuisance on neighboring territory. As one cannot be heard in fraud against the just rights of a foreign nation, or be permitted to furnish the means of transgressing the law, or to insist upon illegal contracts, so creators of nuisances have but a small show of right, for either claims or defenses.

¹ *Flynn v. Taylor*, 127 N. Y. 596; *N. Y. C. & H. R. R. Co. v. The City of Rochester*, 127 N. Y. 591; L. R., 4 Ch. App. Cas. 161.

² *Wood on Nuisances*, 31; 1 Russ. Cr. 320; *Rex v. Ward*, 4 A. & E. 484; *Rex v. Tindall*, 6 A. & E. 143; *Campbell v. Seaman*, 63 N. Y. 568; *Story on Const. L.* 308; *Lightfoot v. Tennant*, 3 Bos. & Pull. 356; *Langdon v. Hughes*, 1 M. & S. 593. "*Pacta quae contra leges constitutionesque vel contra bonos mores fiunt nullum vim habere indubitati juris est.*" Cod. Lib. 2, tit. 3, L. 6; Dig. L. 2, tit. 4, L. 27, § 4. "If a contract be *malum in se* the courts will in no wise interfere to relieve either party." *Tracy v. Talmage*, 14 N. Y. 181; *Hull v. Rugles*, 56 N. Y. 428. As to contracts against public policy, see *Duval v. Wellman*, 124 N. Y. 156.

These considerations have had practical importance in cases brought to enforce contracts or to remove nuisances, in which the disposition of the refuse from public institutions, of corporations, and of cities, has been before the courts.

It is said that corporations having the power to take land, and construct public works, are not amenable to the jurisdiction of a court of equity, if they keep strictly within the lines of their powers,¹ and proceed with due care and skill. "That which the law authorizes cannot be a nuisance such as to give a common-law right of action," is the statement in the United States Supreme Court in *Transportation Company v. Chicago*. Undoubtedly it is true, is the opinion of the New York Court of Appeals in *Cogswell v. New York, New Haven and Hartford Railroad Company*, that "there are cases in which the legislature, in the public interest, may authorize and legalize the doing of acts resulting in consequential injury to private property, without providing compensation, and as to which the legislative sanction may be pleaded in bar of any claim for indemnity." The statutory authority which will suffice² must be express—must relate to matters of public utility in which the people have an interest and the right to control, and be conferred in contemplation of that which has occasioned the injury. In *Benner v. The Atlantic Dredging Company*, where plaintiff's house, at Astoria, N. Y., was injured by the explosions in blasting in the waters of Hell Gate by the defendant, under a contract with the United States government, it was held that in the absence of any proof of negligence in the manner of doing the work the defendant was not liable. The work was in removing rock which was an obstruction to navigation in New York harbor. "The power to improve rivers and arms of the sea, forming the highways of commerce, is vested in the United States government, and where Congress provides for the exercise of such power in a manner sufficient and complete, according to that government's judicial test, it is complete under that of this State."

In the search for an appropriate remedy, it is only that part, or that use of a thing which constitutes the nuisance, that is to be abated. No

¹ *Bisph. Pr. Eq.* (8d ed.) 495; *Kerr on Inj.* 342; *King v. Morris & Essex R. R.*, 18 N. J. E. 897.

² *Trans. Co. v. Chicago*, 99 U. S. 635; *Cogswell v. N. Y., N. H. & H. R. R. Co.*, 108 N. Y. 18; *Hammersmith R. R. Co. v. Brand*, 4 H. L. Eng. & Ir. App. Cas. 171; *Radcliff v. Mayor*, 4 N. Y. 195; *Bellinger v. N. Y. C. R. R. Co.*, 23 N. Y. 42; *Charles Benner v. The Atlantic Dredging Co.*, 184 N. Y. 156; *Matter of Petition of Squire*, 125 N. Y. 181.

unnecessary or wanton injury is to be done,' but as in the examples mentioned of a gate unlawfully placed across a highway and cut down, or of nets improperly set and destroyed, particular care is not essential, and whatever is a reasonable incident in the abatement of a nuisance is defensible. The ordinary illustrations are, of a house built too high, or improperly used; it is only the excessive height, or the wrong use which is to be abated. This limitation is consistent with that on the other side, of a grant whose terms have been exceeded, as where a weir of brushwood was authorized, it was held not to cover one of stone, and where it had come, by changes wrought by time, to obstruct all the navigation of a river, it was held not to have been in contemplation of the original grant.

Particular subjects have had peculiar and fitting adjudication. Oysters planted in public waters may not be removed as a nuisance unless they interfere with the rights of the public, but under a State statute a non-resident may be guilty of a misdemeanor for planting or gathering them.' Where a town was put to yearly expense in repairing a highway continually damaged by an overflow of water caused by a dam, suit was brought and damages recovered in its name against the originator of the nuisance.'

The question of responsibility for an existing nuisance on leased premises frequently arises.¹ Privies may be such a nuisance, for which the landlord may be held, where the buildings are rented for short periods and he is in receipt of rents. The owner of a disorderly house demised with intent, for purposes which are unlawful, or make a nuisance, may be indicted. If the tenant is careless, and himself causes the nuisance, he may be responsible, and in some cases landlord and tenant may be held separately or jointly. Under the Health Laws of the city of New York, either the owner, lessee, tenant or occupant, may be held for violations of the Tenement-House Laws and Sanitary Code.

¹ *Ely v. Supervisors*, 86 N. Y. 297; *Gray v. Ayres*, 7 Dana, 375; *Welch v. Stowell*, 2 Doug. 32; *Barclay v. Perkins*, 25 Pa. St. 508; 119 N. Y. 240 and cases cited; 2 Salk. 458; 42 N. J. L. 341; 9 Rep. 53; *Respal v. Arnold*, 8 Yeates, 423.

² *Mayor of Colchester v. Brooks*, 7 Q. B. 839; *State v. Taylor*, 3 Dutch., 117; *People v. Lowndes*, 130 N. Y. 455.

³ *Inhabitants of Charlotte v. Pembroke Iron Works (Me.)*, 19 A. 902.

⁴ *Rex v. Pedley*, 8 N. & M. 637; 1 Russ. Cr. 329; *People v. Erwin*, 4 Den. 129; *Irvine v. Wood*, 51 N. Y. 224; *Jennings v. Van Schaick*, 108 N. Y. 530; *Wood on Nuisances*, 50; N. Y. Cons. Act, 1882, §§ 539, 653; see *People v. Townsend*, 3 Hill, 479; *Prentice v. Gregor*, 74 N. Y. 381; *Ahern v. Steele*, 115 N. Y. 209. "Responsibility generally attaches to the occupier of land."

To the public authorities special powers and remedies may be granted by the legislature.¹ The power to take sufficient evidence to authorize the declaration of a public nuisance; thereafter to order its abatement in a manner indicated by the order, or by public agents, to accomplish the necessary work under the Board of Health direction, has been already discussed. Other processes for the sanitary abatement of nuisances have also been noticed. "An ordinance passed pursuant to such authority has the same force as an act passed by the legislature itself," was recently held in *City of Rochester v. Simpson*.

¹ N. Y. Cons. Act of 1882, § 585, ¶¶ 1, 2; *Heister v. Met. Bd. of H.*, 87 N. Y. 661; *Pollinsky v. People*, 78 N. Y. 65; *City of Rochester v. Simpson*, 134 N. Y. 414; *id.* 417; 70 N. Y. 287; 57 N. Y. 591; 82 N. Y. 318; 122 N. Y. 268.

CHAPTER XI.

BUILDING LAWS.

The use of a building, we have seen, may constitute a nuisance, but now we have to do with the building itself. Over every stage of its history, and every detail, the foundation, the walls, drains and sewers, the air spaces, light and ventilation, in some cases the halls and approaches, the cellars, the plumbing and the roof, the law watches, and will continue, even if the habitations are deserted, for the text-books tell us, "the village remains, although the houses decay," intending thereby village rights and laws. Repairs may be ordered by writ, allowed in very old law *pro bono publico*, says Lord Coke;¹ or under ordinances of municipal bodies in some places; the regulations of the Metropolitan Board of Works in London; and the Building Department in the city of New York.

The erection of the building is to be in conformity with like authority. The excavation, the lateral support for the walls, the heating apparatus and flues, any engine, boilers, hoistways, elevators, all come under public control for safety and the general welfare; buildings may be vacated and ordered pulled down by like authority.

In *Cain v. City of Syracuse* the city was sued because it had not passed a resolution ordering a dangerous wall pulled down, which, falling, killed plaintiff's intestate.

In *Lord Auckland's* case the contention was with the Westminster Board of Works, because it threatened and intended to take and pull down some buildings because of an error in the general line of the street, by which the board proposed to regulate the front of the plaintiff's houses. It was held that the line of buildings should have relation to the frontage of houses previously existing, and which may be

¹ Co. Litt. 115, b; id. 56, a; id. 200b; N. Y. Laws, chap. 410, 1882, as amended, §§ 471-517; Metropolis Management Amendment Act, 23, 26 Vict., chap. 102; *Lord Auckland v. Westminster Local Bd. of Works*, 7 Ch. App. Cas. 597; *Cain v. Syracuse*, 95 N. Y. 83.

built. It is interesting also that the yard in this case is held equivalent to a house. The question not infrequently arises under the building laws what part of the premises or curtilage shall be comprehended or understood in the word "house." Generally it may be understood to include the lot which is built upon, and it does not necessarily mean a dwelling-house.

The site has its limitations as to the kind of building permissible, and with respect to the approach to it from a street. The dangers of fire have led to the almost universal adoption of fire limits by municipal corporations, within which wooden buildings cannot be constructed. This is assumed to be a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies.¹ There can be no question of public interest in the avoidance of unnecessary risks in the built-up portions of a city; nor in the fair allowance to all houses abutting on a public street, of air and sunshine, as well as of public service from pavements, sewers, water and light. Thus it is in many cities laws have been passed regulating the height of dwelling-houses. Viewed with reference to cutting off the rays of the sun, the rule has proportioned the height to the width of the street in Paris and other European cities.

A different regulation, where fire damages alone have been contemplated, has been adopted elsewhere, as for instance one hundred and thirty feet in Chicago. The principle undoubtedly remains, wherever it may be invoked, of the subjection of private to the public interest in buildings upon urban sites. The inquiry is, however, of more interest because of a recent decision of a different tendency in Connecticut, where it was held by the Court of Errors,² that the Litchfield Borough Charter, which provides that the burgesses are empowered to provide adequate protection against fire, does not authorize the enactment of a by-law establishing fire limits within which "all new buildings or extensions of buildings shall be constructed of brick, stone, iron or concrete, with fire-proof roof, on plans to be approved of by the burgesses." The opinion concludes that "a municipal corporation can

¹ Burrill's Law Dict., S. v. House, and cases cited. Co. Litt. 56, a, speaking of repairs, says: "A *precept* lieth not *de domo*, but *de messuagio*. *Barbier v. Connolly*, 113 U. S. 80; *Mayor v. Hoffman*, 29 Am. Rep. 345; *Dill. on Mun. Corp.* 388; *Resp. v. Duquet*, 2 Yeates, 498; *Wadleigh v. Gilman*, 12 Me. 403; *Brady v. Nor.-Western Ins. Co.*, 11 Mich. 425; *Salem v. Maynes*, 123 Mass. 372.

² *Pratt v. Borough of Litchfield*, 62 Conn. 112; *South Stat. Cons.*, § 367; *Booth v. State*, 4 Conn. 65; see 123 Mass. 372; 2 Yeates, 498; 29 Am. R. 345; 95 N. Y. 89; 113 U. S. 708, and 27, *supra*.

exercise no power which is not in express terms or by fair implication conferred upon it. Any doubt or ambiguity arising out of the terms used by the legislature must be resolved in favor of the public. Restrictions in the building or repairing of wooden structures in the populous part of a city, commonly designated as "fire limits," are invasions of private right, and are to be strictly confined to their literal import." This opinion is more in consonance with some of the older cases than with modern views¹ of the necessary protection for cities, as particularly shown in the United States Supreme Court decisions in *Barbier v. Connelly* and *Soon Hing v. Crowley*, and in decisions in many of the States. In 1838 the Chancellor of New York refused an injunction to restrain the common council of Hudson from passing an ordinance to restrain the erection of any wooden or frame barns, stable or hay press within certain specified limits. It has, however, support in Iowa, in *City of Keokuk v. Scroggs*, where an ordinance of like effect was declared unauthorized. In *Salem v. Maynes* the regulation was enforced, although the building was already begun and the foundations laid. In *Douglass v. Commonwealth* the prohibition was held to prevent the enlargement and elevation of a wooden building, so as materially to alter its character. In a case frequently cited, *Respublica v. Duquet*, based upon a law of Pennsylvania of 1795, references were made to similar provisions in the charter of London excluding wooden buildings. The statute "directing the corporation of Philadelphia to pass ordinances to prevent the erection of wooden buildings in certain parts of the city as they may think proper," was held constitutional. With these rulings, those of *Cain v. City of Syracuse*, above mentioned, are in accord. In *People v. D'Oench* it was held that the power of the examiners of buildings, under the law, to allow an equally good or more desirable form of construction than that originally ordered, was not intended to authorize the board to allow wood to be used in place of the incombustible substances mentioned in the act."

In the city of New York the height of all dwelling-houses used or intended to be used for more than one family, has been regulated in proportion to the width of the streets and avenues on which they front, "not to exceed seventy feet upon all streets and avenues not exceeding

¹ 113 U. S. 27 and 703; *Mayor of Hudson v. Thorne*, 7 Paige Ch. 261; *City of Keokuk v. Scroggs*, 39 Iowa, 447; *Douglass v. Commonwealth*, 2 Rawle, 262; 2 Pa. St. 493; 95 N. Y. 83.

² 95 N. Y. 83; 51 Hun, 33; N. Y. L. 1882, chap. 410, § 504.

sixty feet in width, and eighty feet upon all streets and avenues exceeding sixty feet in width." Hotels have been held not to come under the ordinary description of dwelling-houses, in contemplation of the act, providing that the height of all dwelling-houses, and of all houses used, or intended to be used as dwellings for more than one family, thereafter to be erected in the city of New York, shall not exceed eighty feet in streets and avenues exceeding sixty feet in width.¹ The court goes on to say: "We have no doubt of the competency of the legislature in the exercise of the police power under the Constitution to pass such an act," * * * and holds that mandamus was proper to compel the approval, by the Superintendent of Buildings, of an addition to a hotel over eighty feet in height.

Public safety and considerations forced upon municipal administrations have caused, we may not say developed, most of these regulations and precautions. We find them existing in the crowded cities of older civilizations, springing from the law of necessity antedating our own common law, and far enough removed from what some of our judges have termed "the vices of paternal government." The *insulae*² or apartment and tenement-houses (*domus venales*) of Rome, at the begin-

¹ N. Y. L. 1885, chap. 454; chap. 275, 1892; People, *ex rel.* Kemp, v. D'Oench, 111 N. Y. 359.

² Gibbon, V, 287-9, calls the *insulae*, plebeian habitations, as distinguished from the *domus* which contained probably over four hundred persons. E. J. Gibbs, in Nat. Rev. Littell's Liv. Age, August 20, 1892, more correctly than Gibbon, calculates the inmates of these habitations. In the city of New York many flats of the common order, of tenement-houses, are rated as having four family apartments on each of five floors, and with five to a family. (Plato's Limitation of Children, *Karà Tην Όυσίαν* does not prevail in New York tenements.) Tac. Ann. Ed. Ritter, Lib. XV, C. 41, 43, note, C. 43. There were 46602 *Insulae*, 1780 *Domus* Nard. Roma A I-VIII, 498 Lips de Mag. Rom. I-III, C 4; Gibbon, V, 288, note. The interested reader will pursue this subject further in Tac. Ann. VI, 44, cf Preller Reg. Stat. Rom. 86, Juvenal Sat. III, 166, 199, 233-4, and notes of Heinrich, who shows the necessity of the custodian for each house, to watch over and protect the crumbling walls. *Tabulæ* were the stories, *coenacula* above them, *sub tegulis*. Juvenal speaks of the high rent of the little dark rooms under the tiles, up many stairs, and says:

"Magnis opibus dormitur in urbe.

Inde caput morbi."

Ritter's note, Tac. Ann. XV, 43 "de omnibus urbis aedificiis sermo est," and Lipsius supposes Nero to have taken Trajan's measure of height rather than that of Augustus. Sex Aurel Epit, 13; Suet, 16; Strabo, V, 3, 7; Cic. Off. 3, 16, 66. The grumbling about sunlight in the street, is noted. Tac. Ann. XV, 43. It would be difficult to exhaust the references. Cicero shows that another order could be made, viz., that of the augurs, through the auspices, and he notes the buildings on the Caelian Hill quorum altitudo officeret auspiciis, and had to be demolished. Cic. Off. III, 66.

ning of our era, present a parallel almost identical with the tenement-houses of New York, occasioning the same difficulties, including the same objections, obliging observation, care and legislation, affording examples similar to those found on pages of modern acts. Built in haste, of poor materials, on narrow streets, with five to seven stories above the basement stores, having, as a recent writer very reasonably calculated, twenty persons to a flat or story, and sleeping rooms above these, immediately under the roof, averaging, perhaps, one hundred souls or more to a house, and in the time of Theodosius exceeding by nearly ten thousand the present tenement-houses of New York. They were in constant danger of tumbling in; fires in them were apprehended; pestilence struck first and most savagely in their recesses, and it was a boon drawn from the several great conflagrations of Rome, that the government sought to open and rebuild them on wider streets, with open areas, porticos added for protection from the sun, and water accessible for public use. Tacitus tells us of the order of rebuilding Rome, and that Nero protected the fronts of the insulae, opened and purged the areas, with restriction upon the height of buildings. Augustus permitted seventy feet, Trajan sixty feet, and it is supposed Nero's rule was the latter. The grumbling also is preserved of those who declared that the old form was more conducive to salubrity, because "the narrowness of the streets and the height of the roofs did not permit the rays of the sun to break through, but now the opening was such that there was no shade and they burned with greater heat. Provision was, however, made of porticos for all new houses. These High Building Acts are said to have applied to every building, but to have been constantly transgressed.

Respecting one house, the Superior Court of New York, at the Equity Term in 1892, *Knabe v. Levelle*, said, in passing upon the right to an alleyway, that the "defendant had the right to extend his building back upon his lot and to build it as high as he pleased to go." It is the policy of the law to encourage the most advantageous use of land. And "the courts will not be diligent in searching for pretexts with which to check the enterprise of an owner of the fee," is the remark of the court in *Johnson v. Shelter Island Grove and Camp Meeting Association*, where, on a map used at the sale of lots, a portion of the ground not laid out into streets was marked as "The Ramble," and thereon ground was marked out as a site for a chapel on which the defendant proposed to erect a hotel. In *Dexter v. Tree* the right of an owner of land abutting on a public alley to light and ventilation from it was up-

held. The court says: "If an alley is a public one, a party whose building adjoins the same, will have a right to use it for light and ventilation, as well as for other lawful purposes; but if it is not public, the fact that it has remained a long time uninclosed, and such party has built his house with windows and doors opening upon it and enjoyed the benefit of light and ventilation from it, will confer no right upon him to have it kept open." A private alley may be covered over leaving only a passage-way such as is reasonably necessary and convenient for access to plaintiff's premises.¹

The effect of public improvements upon the situation of, and structures on private property bordering upon them; has caused much discussion. Chief Justice Bronson, in the opinion of the court, in *Radcliff's Executors v. The Mayor, etc., of Brooklyn*,² says: "When men buy and build in cities and villages they usually take into consideration all those things which are likely to affect the value of their property, and particularly what will be done by way of opening and grading streets and avenues." The doctrine of this case, constantly referred to and sustained in the State of New York, is that "an act done under a lawful authority, if done in a proper manner, will not subject the party doing it to an action for the consequences, whatever they may be." The corporation of the city of Brooklyn regularly laid out and opened a street and thereby acquired title to the land over which it passed. Afterward they proceeded to grade the street in order to bring it into public use, and in so doing removed a high bank which constituted a natural support to the premises of an adjoining owner, so that a portion of his land fell. The adjacent owner could not maintain an action on the case for the damages sustained. The opinion cites "a single instance of payment of damages in such a case, *Brown v. City of Lowell*," and does not fail to observe that "the opening of a new thoroughfare may often result in advancing the interest of one man or a class of men, and even one town at the expense of another." The opening of a street in a city is not necessarily an injury to the adjoining land-owners. On the contrary, it is in almost every instance a benefit to them."

¹ *Johnson v. S. I. G. & C. M. Ass.*, 122 N. Y. 386; *Dexter v. Tree*, 117 Ill. 532; *Grafton v. Moir*, 180 N. Y. 465; *Gerrish v. Shattuck*, 182 Mass. 285; *Burnham v. Nevins*, 144 Mass. 88.

² *Radcliff's Executors v. Mayor*, 4 N. Y. 195.

³ *Brown v. City of Lowell*, 8 Metc. 172; *Columbia Gas-light and Coke Co. v. City of Columbus*, Ohio Sup. Ct., Feb., 1893, 83 N. E. R. 292; *Reining et al. v. N. Y., L. & W. R. R. Co.*, 128 N. Y. 157; *Matter of Deering*, 98 N. Y. 361.

In *Reining v. New York, L. & W. Company* the same court, in 1891, referring to this case, held that the owners of lots abutting on a city street, the fee of which is in the municipality for street uses, are entitled to the benefit of the street in front of their premises for access and other purposes. The right of such owners is not so absolute in its character that they can resist or prevent any and all interference with the street to their detriment; nor can they assert it to stay the municipality in the control, regulation or improvement of the streets, although it may be made to appear that, the privileges said owners had enjoyed and the benefits they had derived from the street, would be curtailed or impaired to their injury by the changes proposed. * * * The primary object of the power to alter the grade of the streets conferred upon common councils in municipal charters, is to enable the municipal authorities to render a street more safe and convenient for public travel, to afford drainage and to adapt the street more perfectly for the purpose of a public way. A municipality cannot, under the guise of exercising such power, appropriate a part of a street practically to the exclusive use of a railroad company and cut off abutting owners without compensation, from using any part of it in the accustomed way.

The further question of the right to close a street is passed upon in *Egerer v. New York Central and Hudson R. R. Co.*, and decided, that while the legislature may authorize the closing of a street, the power "may not be exercised so as to deprive an abutting owner of the access to his premises furnished by the street, without making compensation; at least unless there is provided or left for him other means of access."¹ A portion of a street upon which plaintiff's premises abutted was discontinued, and defendant, having previously obtained title to the fee of the street, erected thereon an embankment about fourteen feet high, upon which it laid its tracks, leaving a space between it and said premises so narrow as not to admit of the approach of a team and carriage to them. Plaintiff's premises were used and occupied as a hotel and boarding-house. In the court below a verdict had been directed for the defendant, but this was held error. The appellate court, in the opinion of Mr. Justice Potter, says: "We come now to the more particular consideration of the question whether a party enjoying the right of light, air and access, may be deprived of

¹ *Egerer v. N. Y. C. & H. R. R. Co.*, 130 N. Y. 108; N. Y. State Cons. Act, 1, § 6; N. Y. L. 1880, chap. 147; *Abendroth v. Man. R. R.*, 122 N. Y. 1; *Kane v. N. Y. El. R. R.*, 125 N. Y. 165.

such rights by the action of the municipal authority in the discontinuance of the street, in respect to which such rights exist, without compensation therefor, or any provision for compensation. This question may be considered as simply of a discontinuance of the street in question, within the power and discretion possessed by the proper officers of the city of Rochester, or as a discontinuance or an alteration of the street by municipal authority, or by commissioners acting for the municipality under an act of the legislature, in connection with, and in furtherance of, the convenience and advantages of the defendant's railroad. I am not disposed to adopt the doctrine that a municipality may close up a street upon which abutting owners have built expensive structures for residences and business, and enjoyed access to them from the street so closed for many years, arbitrarily and without compensation for the injuries done to such rights."

The assessment of the expenses of public improvements in grading streets, pavements, sewers, etc., and the adjustment of taxes upon the owners and occupants of lands benefited, are incidents, and the powers thus exercised are constitutional. The remedy against unwise or unjust modes of taxation is not to be sought from the judiciary, says the court in *People, ex rel. Griffin, v. The Mayor*.¹ In citing and approving this case, in *Lamb v. Connolly*, the court holds, that while a notice to property-owners of the adjustments made was necessary, the kind of notice and the mode of giving it were matters of legislative discretion, and a sufficient notice is prescribed in the act under consideration. The old maxim, *cujus est solum ejus est ad coelum et ad inferos*, is illustrated on one side by the right to so much light as falls perpendicularly upon his own soil, and no more. Lateral light is something equivalent to an easement, is decided in *Auburn Plank-Road Company v. Douglass*. But it is limited on the other side, as to excavations, by necessity and frequently by statutes, and is subject to a reasonable use with regard to the rights of others.²

In *Vaughan v. Menlove* the defendant was held liable for constructing a hayrick at the extremity of his land in so negligent a manner

¹ 4 N. Y. 419; *Lamb v. Connolly*, 123 N. Y. 531; see N. Y. L. 1883, chap. 114.

² 9 N. Y. 447; *Vaughan v. Menlove*, 3 Bing. N. C. 468; *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463; *Clemence v. City of Auburn*, 66 N. Y. 334; *Goodfellow v. Mayor of N. Y.*, 100 N. Y. 16; *Dodd v. Holmes*, 1 Ad. & El. 493; see cases cited in 4 N. Y. 200, 201; *Mahan v. Brown*, 13 Wend. 261; *Peyton v. Mayor, etc.*, of London, 9 B. & C. 725; *Panton v. Holland*, 17 Johns. 92; *Lasala v. Holbrook*, 4 Paige Ch. 169; *Thurston v. Hancock*, 12 Mass. 220.

that spontaneous ignition followed; and a city may be held liable for negligence in a culvert, or the grading of a sidewalk or pavement. An underground stream of water may be cut off; or a house may be built, though it stops the light of a neighbor. A mine may be worked, though it injure the house of another at the extremity of his land. A house may be pulled down, though the adjoining house fall for the want of support. A wall may be taken down though the vaults of a neighbor be destroyed.

In *Lesala v. Holbrook*, the plaintiffs were the owners of a church, built within six feet of the line of their lot, and the defendant, for the purpose of building on his adjoining lot, was sinking the foundation for his building sixteen feet below the natural surface of the ground, and ten feet below the foundation of the church, whereby the foundation of the church was greatly endangered; and yet, an injunction to restrain the excavation, which had been granted by a master, was dissolved by the Chancellor, on the ground that the defendant was exercising a lawful right. In *Thurston v. Hancock*, the plaintiff had built a valuable house on Beacon Hill, in the city of Boston, one side of the house being within two feet of the side of his land, and had taken the precaution to sink its foundation fifteen feet below the ancient surface of the ground. Seven years afterward the defendant commenced digging and carrying away the earth from his adjoining land, and dug to the depth of from thirty to forty-five feet below the natural surface of the ground; by reason of which the foundation of the plaintiff's house was rendered insecure, and he was obliged to take the house down. It was held that no action lay for the injury to the house.

In New York, Brooklyn and other cities, excavations are to "be properly guarded and protected so as to prevent the same from becoming dangerous to life or limb." They shall be sheet piled, where necessary to prevent the adjoining earth from caving in, by the person or persons causing the excavations to be made. Whenever an excavation of either earth or rock for building or other purposes shall be intended to be made, or shall be carried to the depth of more than ten feet below the curb; the persons or person causing such excavation to be made shall at all times from the completion thereof, if afforded the necessary license to enter on the adjoining land, and not otherwise, at his or their own expense, preserve any adjoining or contiguous wall or

¹ See N. Y. Cons. Act of 1882, §§ 473-5; chap. 456, 1885; chap. 566, 1887; chap. 275, 1892, § 9; *Ketchum v. Newman*, 116 N. Y. 422.

walls from injury, and support the same by proper foundations, so that the said wall or walls be and remain practically as safe as before such excavation was commenced, whether the said adjoining or contiguous walls are down more or less than ten feet below the curb. Other provisions require this care and protection for walls from their owners, when the excavation does not extend ten feet, and for the preservation of the foundations of party walls, and authorize the Superintendent of Buildings, after twenty-four hours' notice, to enter upon the premises and take such steps as, in his judgment, may be necessary to make the same secure at the expense of the persons whose duty it was to make them so. Where the excavation is to be for light and air, a retaining wall is to be built of sufficient strength to support the adjoining earth.

In *Ketchum v. Newman* it was held that, where an owner of premises in the city of New York, proposing to excavate for the purpose of building thereon, having obtained a parol license from the occupant of the adjoining premises as required by the Consolidation Act, has shored up a party wall and removed the foundation thereof, he may, notwithstanding a revocation of the license, proceed and build up a new foundation wall so as to sustain the party-wall, and for that purpose has the right to enter upon so much of the adjoining premises as is necessary, and until this work is done, if he proceed with reasonable dispatch and does it in a good workmanlike manner, with as little injury and inconvenience as possible to the adjoining occupant, he may not be regarded as a trespasser, nor can he be required to remove the supports to the wall.

The drainage of a single house in a city block is of common interest, and while there has been a universal supervision of privies, water or earth closets, and out-houses under municipal ordinances, or by regulations framed pursuant to statutes, the connection of house-drains with the public sewers is a public matter regulated by the laws governing that portion of the public service. It touches upon these interests, however, in other relations of which two are prominent. The sanitary requirements under health laws, and the drains and plumbing under building laws, are a part of construction. Thus it happens that in most places we have to do with various bureaux, and come to various divisions of the city government, on all the problems to be resolved upon any plan of building. The strength of the walls, and of the materials to be used, the safeguards of health, the prevention of nuisances, the proper disposition of appliances for lighting and heating, for elevators, for shafts, well-holes and skylights belong to different

experience and divergent science and administration. For this regulation generally different laws are to be consulted.¹ The Revised Statutes of the various States take up these subjects under different titles and separate sections.

It was a useful law passed in 1889 in New York, prescribing the materials for construction of buildings of different classes, and for stairs, partitions and ceilings, but the law of 1892 included all the appliances of buildings,² the air, light and vent shafts, the elevators, steam-pipes, the plumbing, electric and heating apparatus, and it further distinguishes private buildings and dwelling-houses, and those of public character, with special provisions for all the dangers attendant upon the use of such buildings.

Hotels, churches, theatres, restaurants, railroad depots, public halls and other buildings, used or intended to be used, for purposes of public assembly, amusement or instruction, shall have the halls, doors, stairways, seats, passage-ways and aisles, and all lighting and heating apparatus arranged as the Superintendent of Buildings shall direct, to facilitate egress in case of fire or accident. No building, to be used or occupied as a public school, shall hereafter be erected within two hundred feet of a block occupied in whole or in part by a criminal court or prison; nor shall it be lawful to hereafter erect a building to be used and occupied as a criminal court or prison, within two hundred feet of a school.

¹ In the city of New York for sewer connections reference is to this bureau in Department of Public Works. For construction to the Department of Buildings, and prior to 1892 for air, light and ventilation, and also for plumbing, to the Health Department or the Building Department. In the city of New York these requirements can be found in N. Y. Cons. Act of 1882, as amended, and in the Law of 1892, chap. 275. The Tenement-House Law, chap. 908 of 1867, was amended in 1879, and again by chap. 84 of 1887. Drawings and plans of buildings had to be submitted to the Fire Department, but for plumbing and drainage under the Law of 1881, chap. 450, the plans of drainage and plumbing were filed with the Health Department for approval. In Revised Statutes of Illinois and Ohio, and in Public Statutes of Massachusetts, a different system prevails. Observe in Revised Statutes, Ohio, regulations for buildings in cities and villages, section 1692; sanitary regulations, 2128-30; insecure buildings, 2449-54; fire limits, 7671-3; external walls near streets, 7677; chimney walls, 7683; scuttles, 7685; fire-escapes, 7694; fire-proof doors, 7696; electric light and power company wires to be arranged, section 8752; hallways in public buildings, 7764; theatres, 7700; light and air shafts, 7708. In New York by chapter 275, 1892, much of this administration is merged in the new Department of Buildings.

² N. Y. Laws, 1889, chap. 297; chap. 275, 1892; see R. S., Ohio, §§ 2573, 2574; *Rose v. King*, 49 Ohio, 213.

In like manner, theatres or opera houses, and buildings where stage scenery and apparatus are employed, are placed under special requirements, are subject to the approval of the Superintendent of Buildings, and must have a license from the Mayor, who may close the same if a certificate of the Superintendent of Buildings shall not have been given. There shall be courts, corridors, balconies, stairs, fire walls, doors opening outwardly, fire-proof curtains at the proscenium opening, aisles as prescribed for the auditorium, stand pipes for water, automatic sprinklers, exit passage marked and distinguished. Minute details in these and in many other particulars come under the police laws of buildings.

Several further and somewhat peculiar restrictions may be noted. "Signs of wood shall not be erected over two feet high on any building." Piazzas or balconies of wood and sheds of wood not over fifteen feet high necessitate permits. Roofs, scuttles, skylights and leaders are regulated. Detailed plans of the drainage and plumbing of all buildings, both public and private, are to be executed in accordance with plans previously approved in writing by the Superintendent of Buildings, and also detailed statements in writing of the specifications, and a full and complete copy of the plans for the erection, construction or alteration of any building or part of a building, or any platform, staging or flooring to be used for standing or seating purposes in the city of New York, shall be filed prior to the work, which shall not be commenced until said statements and plan have been filed and approved by the Superintendent of Buildings.

Ordinary repairs which may be made without notice, are not construed to include the cutting away of stone or brick walls, or the removal or cutting of any beams or supports, or the removal or closing of any staircase. Walls or piers, or parts of walls and piers, shall not be built in freezing weather, and if frozen shall not be built upon. The terms of the law are "that nothing herein contained shall prevent a roof garden, art gallery, or room for similar purposes being placed over a theatre or public building, provided the floor of the same and the roof of the building be of fire-proof materials."

The supports and rafters shall be of iron or steel and it shall be covered with glass or fire-proof materials, and shall not be over the portion of the building used as a stage. The Superintendent of Buildings may pass upon the quality of any materials to be used. The general provisions apply that no wall structure, building, or any part thereof, shall be built, constructed, altered or repaired in the city of New York, except in conformity with the provisions of this law. Violations of

different sections are constituted misdemeanors. Penalties are authorized and large discretionary powers vested in the administration.

It is a singular proof of the character of this law for community interests, that as in few others, where there are practical difficulties in the way of carrying out the strict letter of the law, in order that "the spirit of the law may be observed, the public safety secured and substantial justice done, the provisions of the title may be modified by a certificate from the Superintendent of Buildings," after a Board of Examiners, consisting of a member of the New York Chapter of the American Institute of Architects, one member of the New York Board of Fire Underwriters, two members of the Mechanics and Traders' Exchange, one member of the Society of Architectural Iron Manufacturers, one member of the Real Estate Owners and Builders' Association, one member of the New York Real Estate Exchange (Limited), all of whom qualified as prescribed, shall be appointed by their respective organizations of said city and so certified annually to said Superintendent of Buildings, and the Chief of the Fire Department of the city, shall have approved of the modification. The said examiners shall each take the usual oath of office before entering upon the performance of their duties."

These powers have been sustained by the decisions of the higher courts.¹ In the Fire Department of the City of New York against The Atlas Steamship Company, the history of legislation in relation to buildings and the prevention of fires in said city was given, and it was held, that "the jurisdiction of the Fire Department of the city of New York over the construction of buildings and other structures on the wharves and piers in the city, include structures on the wharves and piers owned by the city as well as those owned by private individuals." In the same case the provisions of the act constituting the Board of Examiners was declared constitutional, and yet "the members of the Board of Examiners are not, as such, city officers." The "determination of said Board of Examiners as to the mode of construction of a building if

¹ Fire Department v. Atlas S. S. Co., 106 N. Y. 586; N. Y. L. 1874, chap. 547, contained a similar provision to that of chap. 275, 1892, for a Board of Examiners. By chap. 521, L. 1880, the Department of Buildings was made a bureau in the Fire Department. The New Building Department was created by chap. 275, 1892. See Matter of Wright, 29 Hun, 357; Wiley v. Mulledy, 78 N. Y. 310; McRickard v. Flint, 114 N. Y. 222. In District of Columbia v. Woodbury, 136 U. S. 450, appears the charge to the jury that "no one has the right to excavate and dig trenches, and connect with the water mains, gas pipes and sewers, without a permit from the authorities."

their requirements are not wholly impracticable, even if they are unreasonable, may not be reviewed by the courts."

In *McRickard v. Flint* it was held that "the omission of an owner of a building in the city of New York, used for business purposes, in which there is a hoisting elevator, to comply with the statute of 1874 requiring that the openings on each floor shall be protected by such a substantial railing and trap-doors to close the same, as shall be approved by the Superintendent of Buildings, and that such trap-doors shall be closed at all times, except when in actual use, is *prima facie* evidence of negligence." "*It is incumbent on him to call upon the officer for directions and approval.*"

A bureau of fire-alarm telegraph and electrical appliances was constituted in the Fire Department of the city of New York by the Building Law cited above. The Board of Fire Commissioners is authorized and directed to prescribe rules, regulations, orders and requirements in regard to electrical wires or currents for furnishing light, heat or power for any building, and to enforce the same, and violations are to be punished by penalties provided for other violations of the Building Law. These regulations determine the method of construction, operation, location, arrangement, insulation and use of such wires, appliances and currents, and all other matters in relation thereto as said board shall, from time to time, declare necessary for the protection of life and property. They are to be published and any amendments in addition thereto, and "no such wires, currents or appliances shall thereafter be introduced into or placed in any building in said city unless the same be done in compliance with the requirements of said rules and regulations."

Added to this supervision of construction of buildings and their appliances is the office and duty of inspection. Notwithstanding the effort to merge or codify building laws in the city of New York in one act, there still remains in the Police Department inspection of boilers; in the Fire Department the inspections we have noticed; in respect to nuisances, certain inspections still belong to the Health Department; and for elevators the Superintendent of Buildings shall make regulations. For passenger elevators, "with a view to the safety

¹ N. Y. Laws, 1892, chap. 275, §§ 4, 42, 44. This law is in some provisions new and hastily drawn, and in the transfer of authority from one department to another may not prove sufficient when put to the test of controversy and adjudication. N. Y. Cons. Act, 1882, as amended; Boilers, Police, § 310; Fire Dept. 427; Bd. H. 535. 538, 539, 555, 561, 575, 576, 597; Elevators, N. Y. Laws, chap. 275, § 492; Fire Alarms, etc., id., § 517½.

of passengers, the Superintendent of Buildings shall provide for their inspection, and also prescribe suitable qualifications for persons placed in charge of them." Whenever repairs are necessary, and defects are found, upon notice from the Superintendent of Buildings, the use of an elevator shall cease until he has given a certificate that it has been put in safe order and is fit for use.

The house-owner or occupant's defenses, however, remain, as we have seen in many of the cases cited in this chapter, and particularly in respect to excavations and elevation, except as restrained by express statutes, and to access, light, air and ventilation from public streets and public places.¹ In *People v. D'Oench* a mandamus was allowed to compel the action of the Superintendent of Buildings. In *Reining v. N. Y., L. & W. R. R. Co.*, and in *Egerer's* case, the right of approaches to premises abutting on the street was maintained. In *Dexter v. Tree*, in *Brooks v. Reynolds*, and in *Storck v. Metropolitan Elevated R. R. Co.*, we have the right to air and light protected. In *City of Buffalo v. Chadeayne*, in an action to recover a penalty for an alleged violation of an ordinance of plaintiff's common council, prohibiting the erection, without permission of that body, of a wooden building within the fire limits prescribed, as provided by the city charter, it was held that when defendant entered upon the construction of the buildings pursuant to the permit, he acquired a vested right therein, of which the Common Council had no power to deprive him, and that the action was not maintainable.

In the *Telegraph* cases, and in the *American Rapid Telegraph Co. v. Hess*, we have the telegraph wires in the streets declared a nuisance; and the city of San Francisco having by ordinance forbidden the stretching of electric wires over and upon the roofs of buildings, this practice and injury to private houses was held to be a nuisance in the case of *Electric Improvement Co. v. City and County of San Francisco*. In *Yick Wo v. Hopkins* and in the case of *Ex parte Sing Lee*, recently decided in the Supreme Court of California, ordinances of the city of San Francisco and of the town of Chico, prohibiting the carrying on of the lawful business of a laundry within the limits of certain blocks of the city or town, were held arbitrary, unjust and unconstitutional.²

¹ *People v. D'Oench*, 111 N. Y. 359; *Reining v. N. Y., L. & W. R. R. Co.*, 128 N. Y. 157; 130 N. Y. 108; *Dexter v. Tree*, 117 Ill. 532; *Brooks v. Reynolds*, 106 Mass. 31; *Storck v. M. E. R. Co.*, 181 N. Y. 514; *City of Buffalo v. Chadeayne*, 184 N. Y. 163; *Bischoff v. N. Y. E. R. R. Co.*, 188 N. Y. 257.

² *Am. R. Tel. Co. v. Hess*, 125 N. Y. 644; *N. Y. v. Squire*, 14 Daly, 154; *Yick Wo v. Hopkins*, 118 U. S. 356; 144 U. S. 550.

In the last-mentioned case the ordinance required a permit from the board of trustees of the town, which should not be granted unless the "written consent of a majority of the real estate owners within the block wherein it is proposed to maintain the laundry, and also of the four blocks immediately surrounding such block," had been obtained. These were declared not proper police regulations and unconstitutional. The court says: "The personal liberty of the citizen and his rights of property cannot be thus invaded under the disguise of a police regulation;" but the court affirms, upon the authority of many cases cited, that reasonable regulations and reasonable restrictions may be adopted where a town or city deems them necessary for public health or safety. The instances are given that in the exercise of its police power it may impose restrictions as to the kind of buildings which may be used for such purposes, "as that it shall be of brick or stone in large and closely built cities, that it shall have sufficient drainage," and the hours within reasonable limits may be prescribed during which the work of the laundry shall be suspended.

The proposed use for a building naturally governs the plan of construction. For a dwelling-house, a hotel, theatre or factory different rules prevail, and they are by no means exhausted when the conditions of the building laws are satisfied.¹ The Factory Laws previously referred to, have their demands for cubic air space, for the conveniences and appliances of the working rooms for air, light, ventilation, protection against dangerous machinery, in stairways and passages, about hoistways, and whatever shall be found by the officers appointed for such purpose necessary to factory occupation and use. Health laws and sanitary ordinances also may apply to features of the plan. Factories and works of some sort are absolutely prohibited in certain localities because of the nuisances engendered by them. Tenement and

¹ See San. Code of N. Y., §§ 17, 18, 20, 22, 23, 27, relative to overcrowding, ventilation, passages, safeguards, privies, and §§ 56, 59, 82, 184, prohibiting without a permit certain establishments; N. Y. L. 1892, chap. 646, "An act to prevent fat-rendering, bone-boiling or the manufacture of fertilizers within the corporate limits of any incorporated city of this State, or within a distance of three miles from the corporate limits thereof;" conviction under this law sustained, *People v. Rosenberg*, 138 N. Y. 410; see *Fertilizer Co. v. Hyde Park*, 97 U. S. 659; the definition of a building in *People v. Richards*, 108 N. Y. 187, is possibly interesting in this connection, especially as an early discussion of the controlling force of sanitary ordinances grew out of a cemetery vault case, *Coates v. Mayor*, 7 Cow. 505; *People v. Richards* holds that a vault is not a building within the meaning of the Penal Code, §§ 498, 504. In *Matter of Application of Paul*, 94 N. Y. 497, "the words 'tenement-houses' refer to a distinct class of houses recognized and defined by law."

lodging-houses, which we shall presently consider, form a distinct class, for which additional legislation has for many years been provided. In the Fifth Baptist Church case it was held that the authority to construct works, as the plaintiff in error deemed necessary and expedient, did not authorize it to place them where it thought proper without reference to the property rights of others.

In *Hill v. Managers of Metropolitan Asylum District* it was said that discretionary powers granted are to be exercised in strict conformity with private rights. *Cogswell v. New York, N. H. & H. R. R. Co.*, and *Bohan v. Port Jervis Gas Light Co.*, maintain that a grant or authority conferred do not cover and sanction a nuisance. "There are numerous examples in recent legislation of the exercise of legislative power to declare property held or used in violation of a particular statute a public nuisance, although such possession and use before the statute was lawful," says the court in *Lawton v. Steele*. This may also apply to buildings constructed or fitted for particular purposes which may be deemed nuisances.¹

The assumption is that buildings properly constructed do not fall without adequate cause, and the owner is held liable for the ruinous and dangerous condition of the walls. Accidents of this character have occurred with new buildings, as was recorded of a row of buildings in Brooklyn within two or three years. A house likely to fall is a nuisance for which an indictment lies against the occupier, is held in *Regina v. Watts*; and *Mullin v. St. John*,² and *Rector, etc., of the Church of the Ascension v. Buchardt*, impress upon the owner the duty of preventing such dangers. The inference of negligence prevails in these cases unless rebutted.

The appurtenances of the building may cause injury for which the owner is not responsible. A conductor pipe for water, constructed with due care and in a lawful manner, discharging water upon the sidewalk where ice formed, was held not to be a nuisance, and as defendant neither erected it nor used it, he was not liable until requested to abate it.

¹ *B. & P. R. R. v. 5th Bap. Ch.*, 108 U. S. 317; *Hill v. Man. Met. A. D.*, L. R., 4 Q. B. 433; *Cogswell v. N. Y., N. H. & H. R. R.*, 103 N. Y. 10; *Bohan v. P. J. G. L. Co.*, 122 N. Y. 18; *Lawton v. Steele*, 119 N. Y. 234; *Mugler v. Kansas*, 123 U. S. 623; *Com. v. Purcell*, 154 Mass. 388; *State v. Marston*, 64 N. H. 603; *Scovill v. McMahon*, 26 Atl. R. 479; 62 Conn. 378.

² *Mullen v. St. John*, 57 N. Y. 587; *Regina v. Watts*, 1 Salk. 357; *Rector, etc., v. Buchardt*, 3 Hill, 193; *Kearney v. London B. & S. C. R.*, 5 Q. B. 411.

Generally the defense is good when the effect of a storm, as for instance upon a roof in good condition, is the cause of injury; but the principle cited in *Mullin v. St. John* prevails, that "if the roof was in a bad condition, he who was bound to keep it in repair may be liable to make good the damage that has happened, according to the circumstances."

Lufkin v. Zane, and *Ahern v. Steele*¹ sustain the rule that a grantee or devisee of premises subject to a lease and without notice of a nuisance, or without power to abate it, if existing at the time the title passes, or if it be created and continued by the tenant, is not responsible for injury from it.

In *Ely v. Supervisors of Niagara County* it was held unnecessary to destroy a house kept as a house of ill-fame though it were a public and common nuisance, but such moderation has been held not essential, or impossible, in other cases, as in *Hart v. Mayor*, *Van Wormer v. Mayor*, *Meeker v. Van Rensselaer*. Relief could not be obtained from the foul premises of a gas company, slaughter-house or fertilizing company if they were found a nuisance, simply by a discontinuance of the business.² Houses which have become a part of the nuisance may have to be torn down, and private interests may be affected, with as little recompense as when a house is destroyed because in the path of a fire, or a business falls under the prohibition of law. In *Cranford v. Tyrrel* an injunction had been granted against the disorderly use of premises, as a house of assignation and ill-fame, the resort of boisterous and indecent people, not only a common nuisance, but an annoyance and disturbance to the occupants of plaintiff's premises. The Court of Appeals of New York held these grounds sufficient for the judgment.

The respective obligations resting upon landlord and tenant to prevent a nuisance from a building have been carefully distinguished in *Timlin v. Standard Oil Company*, reviewing *Edwards v. N. Y. and Harlem R. R. Co.*, *Ahern v. Steele*, and *Regina v. Watts*.³ In the latter case the house was in a public highway, and liable to fall at any

¹ *Wenzlick v. McCotter*, 87 N. Y. 122; see *Ahern v. Steele*, 115 N. Y. 203; *Lufkin v. Zane*, Mass. Sup. J. Ct., Sept. 8. 1892, 31 N. E. R. 757; 1 *Domat Civ. L.*, § 1557.

² 86 N. Y. 297; 9 Wend. 590; 15 Wend. 263; *id.* 397; *Cranford v. Tyrrel*, 138 N. Y. 341. Lease of premises to be used as a house of prostitution is void. *Ernst v. Crosby*, 140 N. Y. 364.

³ *Timlin v. S. O. Co.*, 126 N. Y. 514; 1 Salk. 357; *Edwards v. N. Y. H. R. R. Co.*, 98 N. Y. 245; *Todd v. Flight*, 9 C. B. (N. S.) 377; see *Dobbins Distillery v. U. S.*, where the fraudulent act of the lessees, although they were unknown to the owner, subjected the distillery to forfeiture to the United States, 96 U. S. 395.

time, and the court held the tenant of the whole house "to guard the public safety, no matter how precarious his title was in point of time." In the Edwards case the defendant leased a building which was designed for public entertainments, to be used for the purpose of a pedestrian exhibition. There was a gallery in the building suitable for its purpose for a limited number of persons. It was crowded with noisy and turbulent people, stamping and keeping time with the music, and fell. It was held that the owner was not liable, in the absence of evidence to charge him with knowledge of insufficient strength in the gallery in the way it was used, or of defects. The court was divided in opinion upon two propositions discussed: that there was no implied warranty upon the demise of real estate that it was fit for occupation, or suitable for the purposes for which it was leased, and that in these respects there is no distinction between a lease of a dwelling-house and of premises to be used for a public purpose. It was said, however, that "where the owner leases premises knowing that they are dangerous and unfit for use, he is guilty of negligence, and may be held responsible for injuries resulting directly therefrom." The duty required is similar in this case to that of the tenant in numerous cases, where proper care, adequate arrangements and provisions for safety are demanded of those who invite the use of their premises by the public, and the attempt is made to reconcile the apparently divergent cases upon this view.

The English courts are said to have receded from the earlier rule of implied warranty of fitness for the purpose of the lease, and Chief Justice Earle in *Robbins v. Jones* is quoted as saying that "a landlord who lets a house in a dangerous state is not liable to tenants, customers or guests for accidents happening during the term, for fraud apart, there is no law against letting a tumble-down house." Negligence is not to be inferred simply from the fact that the structure breaks down, but all these cases illustrate the necessity of a public law. Under a law requiring repairs neglect may become, *prima facie*, negligence, as we have seen in *McRickard v. Flint* which was a private suit for damages. In the *Timlin* case, the court holds that where the owner of premises knows, or by the exercise of reasonable care can ascertain that they have upon them a nuisance, dangerous to the public or an adjoining owner, it is his duty to abate it before leasing the property. If he leases without doing this he is liable to respond in damages to any

one injured,¹ and this, although he did not create the nuisance. The same liability rests upon a tenant who sublets the premises knowing, or being chargeable with knowledge of the existence of the nuisance.⁷ This opinion further distinguishes the situation of tenants of the whole property, from that of tenants of rooms, as in a tenement-house, or in flats, and questions the argument that the latter could be held responsible to the public if they neglected to repair one of the main walls of the house which was out of plumb, and dangerous, to their knowledge.

¹ See *Swords v. Edgar*, 59 N. Y. 28; *Camp v. Wood*, 76 N. Y. 92; *Carson v. Godley*, 26 Pa. St. 111; *Godley v. Hagerty*, 20 Pa. St. 387; *Robbins v. Jones*, 15 C. B. (N. S.) 221; *Mellen v. Morrill*, 126 Mass. 545; *McRickard v. Flint*, 114 N. Y. 222; *Beck v. Carter*, 68 N. Y. 283; *Nelson v. Liverpool B. Co., L. R.*, 2 C. P. D. 311; *Doyle v. Union Pac. R. Co.*, 147 U. S. 413.

CHAPTER XII.

TENEMENT AND LODGING-HOUSES.

The wisdom of the legislature, beyond which courts ever hesitate to go, has been vindicated in the experience of the laws framed for tenement and lodging-houses in large cities. The Court of Appeals of New York has said of them: "These houses, as a known and distinct class, are recognized and defined by law. They are apt to be ill-ventilated, unclean, and packed full of inmates, and to become centers or radiating points of contagious disease. As such they might be the proper subjects of sanitary regulation in the interest of the public health." The court adds, speaking of the title of "An act to improve the public health in the city of New York, by prohibition of the manufacture of cigars and the preparation of tobacco, in any form, in the tenement-houses of said city:"¹ "Nobody would infer, and nobody was bound to imagine that, under a title regulating the tenement-houses alone, there was enacted in the first section a law affecting, not tenement-houses as such, but all the dwelling-houses in the city; a law as to which the title did not only not relate, but by its narrow terms, affirmatively and positively excluded it." Other reasons conspire to sustain this peculiar legislation, and when we consider the great number of these houses and their teeming people, making up a large part of the mass of the resident population of the city of New York, exposed to dangers and to a necessity for protection, which does not extend to private habitations, it is evident that at times their safety must be of critical importance to the rest of the city, and always they must be of public concern. A recent writer has said: "The problem of securing the best lighted and ventilated rooms in new tenement-houses is of paramount and increas-

¹ *Matter of Paul*, 94 N. Y. 497; N. Y. L. 1883, chap. 93; N. Y. Cons. Act, 1882, § 666; N. Y. San. Code, § 8; chap. 908, 1867; chap. 504, 1879; chap. 399, 1880; chap. 272, 1884; chap. 448, 1884; chap. 588, 1880; chap. 84, 1887; L. of 1892, chaps. 238 and 329. Definition of tenement-house, N. Y. L. 1887, chap. 84; R. S. Ohio, 2573; *Rose v. King*, 49 Ohio, 213.

ing importance."¹ It demands attention alike from law-makers, philanthropists and sanitarians. Nor is it devoid of interest even to that portion of a community not included in these terms, who can afford a choice of healthful homes; while the general commingling of the various elements of the population in public conveyances and highways increases the dangers of disease diffusion.

When the law was passed there already existed many thousands of tenement-houses, built without legislative or other restriction, abounding in dark, unventilated rooms, with inadequate water supply and wretched plumbing; privy vaults everywhere polluted the air; lots had acquired high value in the distinctively tenement quarters, which led to overcrowding in order that landlords might get from the many, in the form of rent, the even ordinary commercial interest on the amount invested, which the few could not afford to pay. Much of the tenement-house population had come from rural districts of foreign countries, and, consequently, was uneducated in the sanitary regulations and restrictions necessary for the protection of the populous communities. As sailors and minors and poor debtors have been said to be under the tutelage of the law because helpless and exposed beyond other men, so the tenants of these houses,² in one sense, become as it were the wards of the city, save only that so far no attempt has been made by public law to regulate or adjust the rents.

¹ Chief Inspector Collins' Report, Jan. 2, 1891; Annual Report of N. Y. City Bd. of H. for 1890, p. 49. In New York city a Bureau of Systematic Vaccination was organized under the Law of 1874, chap. 635. By chap. 504, Laws 1879, a special fund called the Tenement-House Fund, of \$10,000, is to be appropriated each year; and each year a summer corps of physicians is appointed to visit the tenement-houses and give advice and prescriptions. Moreover, there is a night medical service provided (chap. 588 of L. 1880), and a physician is sent at once to any sick person whose address is given at the nearest police station; see N. Y. Cons. Act of 1882, §§ 297-301.

² The house-to-house inspection of New York City Board of Health showed 237,972 families in 82,390 tenement-houses in 1888. This calculation is increased in the annual report for 1890, published March 5, 1891, p. 21, to 37,816 tenement-houses and a population of 1,259,768 persons. The report of this Board, 1874-5, pp. 55, 56, shows the great diminution in the death rate of children under five years of age. After the enactment of the Tenement-House Law of 1867 for nine years there was a steady falling off. The special object of the attention of the authorities for the protection of these young children and these people are forcibly portrayed in this report. In 1884, January 2, the legislature appointed a commission to inquire into the character and condition of tenement-houses in the city of New York, with power to subpoena witnesses and require the production of books and papers and to report evidence with their recommendations. Two reports were made in 1885 to the legislature, the preliminary report in the spring of the year, and the final report later, but the rec-

The definition¹ of a tenement-house is fixed by the statutes, and the Board of Health, "to include every building or portion thereof which is rented, leased or let or hired out to be occupied as a home or residence of three or more families living independently and doing their cooking upon the premises, or by more than two families upon any floor, so living and cooking, but having a common right in the halls, stairways, yards, water-closets or some of them." The definition was from 1867 until 1887 limited to "more than three families," but after 1887 to "*three or more families*." The first regulations of these houses were for the ventilation of the sleeping rooms, for fire-escapes, for the repair of roofs to prevent dampness, for the repair and protection of stairways, for a proper provision and construction of water-closets and privies, for the prohibition of the use of a vault or underground room as a dwelling, for whitewashing and cleaning the walls and ceilings twice a year, for the height of ceilings, and for posting the name and address of the owner or agent of the house. The law further prescribed the space on a city lot to be occupied by tenement-houses. At the rear of the lot a clear open space of ten feet was to be left, and between the rear and front buildings there must be ten feet if the build-

ommendations of the commission were not fully before the legislature until 1886, and the Law of 1887, chapter 84, had its origin in, and embodied most of these recommendations. The ages under five years are taken as the test, because the frightful mortality at this tender age had shown the irresistible drain of vital strength in tenement-house life, when unprotected. In 1890, the same constant improvement is shown year by year, and further reason is given for it, when we learn of the great improvement in the character of the houses. It was estimated that dwelling and tenement-houses were built in 1890 to accommodate ninety-five thousand persons in New York city, on greatly improved plans, so that the report states "this large number of citizens will have the benefit of the best plumbing which the sanitary knowledge of the time could procure and with no apprehension from sewer gas." Report, 1890, p. 52. The report adds, "the effective sanitary work accomplished in this city under the plumbing regulations of this department has led many of the other cities of this country and some of those abroad to adopt similar regulations." The complicated health administration in London has precedence in time to that of New York, and is directed to the same objects. In Liverpool, Manchester and other English cities our admiration is excited by their system, and in some details, in the management of the poorer class of boarding-houses and tenements, their more perfect work. Perhaps the successful and improving administration of Glasgow is nearer to our own in system and for comparison.

¹ See Annual Report 1890, p. 20; chap. 84, 1887; N. Y. Cons. Act, 1882, § 666; chap. 908, 1867; N. Y. San. Code, § 8; § 498, chap. 275, N. Y. L. 1892, three families above 1st story; family is defined, N. Y. L. 1892, chap. 655; N. Y. L. 1867, chap. 908; N. Y. Cons. Act, 1882, tit. 7, §§ 647, 666; chap. 399, N. Y. L. 1880; N. Y. Cons. Act, § 661; N. Y. L. 1887, chaps. 84, 288.

ings were to be one story high, fifteen feet if the buildings were of two stories; if of three stories, twenty feet, and if more than three stories high, the distance must be twenty-five feet. The Board of Health was authorized to make further regulations as to cellars and ventilation. Any violation of the act was declared a misdemeanor punishable by fine and imprisonment and also by a penalty of \$10 a day for every day the violation continued, which penalty was to be sued for by the Board of Health. Provision was also made for vacating a house if unfit for human habitation by reason of infection or want of repair. A great advance was made by the enactment of 1880, that "no one continuous building shall be built for, or converted to, the purposes of a tenement or lodging-house in the city of New York, upon an ordinary city lot, and no existing tenement or lodging-house shall be enlarged or altered, or its lot be diminished so that it shall occupy more than sixty-five per centum of the said lot, and in the same proportion if the lot be greater or less in size than twenty-five feet by one hundred feet; but this provision shall not apply to corner lots, and may be modified in other special cases by a permit from the Board of Health.¹

The necessary consequence of this law was that, an application to the Board of Health was necessary to secure the additional space desired by the owners of property proposing to build, and a continual improvement of plans was required until new models of tenement-houses came into existence. No dark rooms were permitted, and new and sufficient air spaces were required, as conditions precedent to the approval of the plan for the occupation of over sixty-five per cent up to seventy-eight per cent of the lot. The same law gave a right of injunction to the Board of Health to restrain any violation, and when by the law of 1881 it was enacted that "the drainage and plumbing of all buildings, both public and private, hereafter erected in the city of New York, shall be executed in accordance with plans previously approved, in writing, by the Board of Health, and the same right of injunction was extended to this subject, this legislation seemed nearly complete. In 1887 the recommendations of the tenement-house commission were substantially embodied in the legislation of that year, which corrected many of the defects, and supplied a number of omissions discovered in the preceding twenty years. In 1890 the Department of Public Works in the city of New York adopted a regulation which prevented the use of

¹ N. Y. Cons. Act, §§ 661, 1089, 501, 537; chap. 450, 1881; chap. 84, 1887; chap. 288, 1887; chap. 399, 1890. The rule of practice of the Board of Health was to allow 78 per cent of lot if the plans were approved.

the water service until the Department of Health had duly certified to the Department of Public Works, that the plumbing of a building had been finished in accordance with approved plans. The comment upon this procedure is to be found in the subsequent report of the Board of Health that "many whose violations of law were habitual now do model plumbing in consequence of this regulation." In 1892 there was something of a retrograde movement in the limitation of the law excluding the stables in use on tenement-house premises prior to January, 1892, and the transfer of powers and duties of the Health Department (which is not mentioned in the title of the bill) to a new Building Department created in this city.¹

This history and lengthened consideration of the tenement-house laws of New York has been given partly because they present a useful, and it would seem an interesting, example of such legislation, generally consistent and constantly advancing through this period, in a somewhat condensed and comprehensive form; and again, because they have not infrequently been misunderstood. These buildings are still amenable to other laws, and the additional requirements, we have noticed, leave still room for the enforcement of the Sanitary Code and the exercise of special powers relative to the abatement of nuisances or the prevention of diseases and the care for public health and safety. Under these laws the Board of Health is not guided by the Sanitary Code, but the statutes themselves and the judgment of the Board of Health determine the proceedings.

For a different purpose, and with regulations looking rather to the cubic air spaces for beds of sleepers, and to light and ventilation as well as safety, are the lodging-houses proper. In them, huddled together, single persons, fleeing from the inclemency of the weather, obtain, for the smallest price, refuge for the night, and in times of pestilence some of these houses have been nests of disease. Still another class of houses comes under the description of having more than three families living independently, and occasionally, but rarely, of having more than two families on a floor; and yet they are subject

¹ See chap. 258, N. Y. L. 1892, amending § 661, N. Y. Cons. Act; chap. 275, L. 1892, tit. 4, § 506. This law, which has a peculiar history, has two singular omissions: 1. Its title does not embrace the transfer of jurisdiction and power from the Board of Health. 2. There is no power given of enforcement of the provisions of section 501, relative to plumbing, if the law be maintained and section 506 remains unaltered. The provisions of section 506 expressly except section 501. Other provisions of this bill are in confusion. As to title of a local bill, see Const. St. N. Y., Art. III, § 16.

to few of the dangers of tenement-houses. Such are the modern factory and apartment houses. In them, however, dark rooms are to be prevented, the rules of construction are to be observed, and very necessary regulations for protection against common dangers, where the responsibility is so divided, are insisted upon under the same laws. Overcrowding, but of a somewhat different type, is also possible in them.

A lodging-house is defined by the act in distinction from the tenement-house, as follows: "Any house or building, or portion thereof, in which persons are harbored, or received, or lodged for hire for a single night, or for less than a week at one time, or any part of which is let for any person to sleep in for any term less than a week." In another section the requirement of six hundred cubic feet of air for each occupant of rooms is limited to the tenement-house.

In 1884, the ordinance of the Sanitary Code was amended, which required a permit for every lodging-house in accordance with the rules and regulations of the Board of Health, and prescribed passage-ways between the beds, and four hundred cubic feet air space for each of the beds or lodgers, whose number was limited by the permit. In 1891 laws were passed relative to cellar ceilings, allowing a discrimination in the percentage of the lot to be occupied, and in the open space between any buildings and the rear line of the lot for lodging-houses, and that these provisions in special cases may be modified as to lodging-houses by a permit from the Board of Health, and contained this provision:

¹ N. Y. L. 1867, chap. 908, § 17; N. Y. Cons. Act, 1882, §§ 666, 664; N. Y. L. 1891, chaps. 89, 204; amending N. Y. Cons. Act, §§ 668, 661; N. Y. L. 1892, chap. 230. Sec. 201, N. Y. San. Code, is as follows: "That for all lodging-houses in which beds are let for lodgers, containing four or more beds in any apartment therein for the use of lodgers, a permit in writing from this department shall be required, and no person in the city of New York shall have, lease, let or keep any such lodging-house or the lodgings therein, or assist in the keeping, hire, or assist in hiring, or conduct the business of any such lodging-house, or the lodging therein, except pursuant to the terms and conditions of a permit in writing previously obtained therefor from this department, an application for which shall be made in accordance with the rules and regulations of the Board of Health by the person or persons who propose to use the same. The beds in all lodging-houses, and in every room in which beds are let for lodgers, shall be separated by a passage-way of not less than two feet, horizontally, and all the beds shall be so arranged that under each of them the air shall freely circulate, and there be adequate ventilation. Four hundred cubic feet of air space shall be provided and allowed for each bed or lodger, and no more beds shall be permitted than those provided in this way, unless free and adequate means of ventilation exist, approved by the Board of Health, and a special permit in writing be granted therefor, specifying the number of beds or the cubic air space which shall, under special circumstances, be allowed."

"No building or premises occupied for a tenement-house shall be used for a lodging-house, private school, stable, or for the storage or handling of rags, unless with a permit in writing from the Board of Health; but nothing herein contained shall be construed to apply to a building or premises so used for a stable prior to January first, eighteen hundred and ninety-two." Two claims for indulgent consideration were pressed upon the Board of Health by owners of lodging houses, and where only the upper portions of a building were used for these purposes, it was argued that the air spaces should be taken, not from the ground, but from the roofs of stores underneath extending to the rear of the lot. Again, when the premises were on a private alley it was claimed an allowance of space of half the width of the alley should be given. Such results were perhaps possible in the case of a lodging-house under the provisions above cited, but not for a tenement-house, as was informally ruled, until 1892. The Court of Appeals' in *Grafton v. Moir* has apparently settled the alley-right question. This case was one for an injunction to restrain the defendant from obstructing an alley-way which afforded an access from a side street to stables at the rear of four lots. The defendant built over the alley-way, a brick building resting on iron girders, supported by walls on either side. The trial court found that the carriage-way was left as convenient in regard to breadth for egress and ingress as before the changes were made, and for this use it had sufficient light and air. The complaint was dismissed, and it was held that a right of way reserved, but not specifically defined in a conveyance, need only be such as is reasonably necessary and convenient for the purposes for which it was created, and plaintiff had no right to claim that the whole alley-way should be left open to his use, or to furnish light and air to his stable.¹ From a public street or alley, the allowance of air, light and space could not be claimed under the terms of the law, and in no event can such an easement be found, as a part of a city lot, whereby its boundaries are extended for the prescribed conditions.

A special obstruction in the way of building houses of either of these classes has been found in covenants covering and running with

¹ *Grafton v. Moir*, 130 N. Y. 465.

² See *Gerard Titles to R. E.* (3d ed.) 763, cases cited; *Avery v. N. Y. C. & H. R. R. R.*, 106 N. Y. 142; 121 N. Y. 82; as to leases, the difference possible, is shown in the opinion of Mr. Justice Earle, *Doyle v. Lord*, 64 N. Y. 489; these authorities mark the distinction between the American doctrine of light and air and that of the English common law. Prescription has been held, in New York State, not applicable to the condition of the cities and villages of this country.

the land, as in the cases of *Trustees of Columbia College v. Lynch*,¹ and *same v. Thacher*, "to provide for the better improvement of said lands and to secure their permanent value by the erection of dwelling-houses of a superior class, to be set back eight feet and used exclusively for dwelling purposes, and not to erect, establish or carry on in any manner on any part of the said lands any stable, school-house, engine-house, tenement or community house," etc. This covenant, sometimes enforced, was in the last-mentioned case released, because of the change in the character of the neighborhood, and the land in question now furnished "an ill seat for dwelling-houses." In *Amerman v. Deane*, where the owner of lands sold to different purchasers, each conveyance containing covenants restraining the use to the purposes of a private residence, and prohibiting certain structures, and an injunction was sought to restrain the building of a large tenement-house on one of the lots granted through various *mesne* conveyances which contained said restriction, it was shown that "the entire surrounding neighborhood had been mostly built up with flats or tenement-houses, and that large sums of money had been expended by the defendant on the one under consideration. The trial court refused a permanent injunction, but fixed the permanent damages, and awarded an injunction restraining the defendant from renting her building until such damages and costs were paid. On appeal this was held no error; that the court in awarding damages was not confined to those sustained before the commencement of the action, but that on their receipt the plaintiff should execute to defendant a release of the covenant.

The constitutionality of these laws must now be admitted. Since 1867 they have received judicial construction in their support so frequently, and the decisions thereon have been acquiesced in, and they have remained undisputed, except as we shall presently note in respect to one or two provisions engrafted upon them since 1887; and, in addition, they have, in detail, been so many times re-enacted in subsequent statutes, that it would seem they must be now well understood and settled, and that the only difficulties are in the administration. The Court of Appeals in New York, in 1868, in the *Heister* case, determined and sustained the general principles, and the validity of the

¹ 70 N. Y. 440; 87 N. Y. 811; *Amerman v. Deane*, 133 N. Y. 355.

² *People, ex rel. Outwater, v. Green*, 56 N. Y. 466; *Heister v. Met. Bd. of H.*, 37 N. Y. 661; *H. Department v. Knoll*, 70 N. Y. 530; *Polinsky v. People*, 73 N. Y. 65; and see 82 N. Y. 318; 122 N. Y. 268; 184 N. Y. 414; N. Y. Cons. Act, 1883, § 663, amended 1887; N. Y. Laws 1892, chap. 39.

powers delegated to the Board of Health in these laws. In 1873 the charter of the city of New York was changed, and in the act revesting the authority previously exercised under previous laws, the legislature omitted to impose a penalty for a violation of a special order of the board.

This defect, if it may be so considered, was passed upon by the Court of Appeals in the Knoll case in 1877. A special order had been made for the ventilation of a privy vault in the yard of a tenement-house in which sixteen families were living, and the action was brought for a penalty for the violation of the special order, and no remedy was sought either under the Sanitary Code or in equity. For these reasons the court held the action could not be maintained. Jurisdiction had been challenged, and particularly on the grounds that the subject of the action was not a nuisance *per se*; and that "the laws applicable to, and creating the Health Department of the city of New York are unconstitutional and void." But the court held that the authority of the legislature covered the Sanitary Code, and that "the power of the present board to make a special order for the ventilation and other improvement of particular premises in a condition dangerous to life or health, when the case is not provided for by the Sanitary Code cannot be questioned" and approved in all respects the Heister case. The next case, Polinsky v. The People, in 1878, announced distinctly the conclusion that "the legislature in the exercise of its constitutional authority may confer upon boards of health the power to enact sanitary ordinances having the force of law within the districts over which their jurisdiction extends." In 1885, in Health Department v. Purdon,¹ the equity powers invoked under these laws were confirmed, but it was said that where there was no express provision of law to be followed, the right to refuse an injunction rested in the discretion of the court.

In 1886, in Health Department v. Lalor, the New York Supreme Court held in respect to the drainage of seven houses that the act of 1881, conferring discretionary powers upon the Board of Health and providing for an injunction to restrain any further progress of any violation named in the act, or of any work upon or about the building or premises upon which the violation exists, had been subsequently reenacted in New York City Consolidation Act of 1882, and that the Health Department being duly invested with the powers already sug-

¹ 99 N. Y. 237; see, also, People v. West, 106 N. Y. 293; Lawton v. Steele, 119 N. Y. at p. 233; Village of Carthage v. Frederick, 123 N. Y. at p. 277.

gested, nothing was presented to entitle the defendant to a reversal of the judgment. The court in the opinion by Mr. Justice Brady adds: "The operation of a statute like the one under consideration may act in some cases oppressively, by subjecting the party to an expense not absolutely necessary for the preservation of the public health. The act must be regarded as a beneficent one. It is in the nature of a police regulation which should be enforced, not despotically but firmly, and in the spirit in which it was conceived and passed,"¹ etc. In 1883, the Superior Court of the city of New York, in the O'Reilly case, affirmed a judgment which, after very careful consideration, had been granted, in respect to a tenement-house containing ten families, wherein the permit of the Board of Health had been violated. There was an additional structure on the lot, and there was not the required space between the buildings at the rear. The judgment was, that "until the distance between the rear wall of the tenement-house and the front wall of the rear building shall in all respects have been made to conform to the requirements of the statute, the defendant and all persons claiming under him be enjoined and restrained from using, occupying, leasing or renting the said tenement-house, or any part thereof, for the purpose of a tenement or lodging-house." These decisions were acquiesced in, and no appeals were taken in other cases on the records of the courts, but not reported.²

¹ Health Dept. v. Lalor, 88 Hun, 542; N. Y. City Cons. Act, 1882, as amended, §§ 587, 1039, 661, 668; Health Dept. v. Thomas O'Reilly, 49 Superior C. R. 531. Other unreported judgments of the trial term of the Supreme and Superior Courts in city of New York, sustaining the Tenement-House Laws are: Health Dept. v. Duffy, Superior Court, March 14, 1880; Health Dept. v. McQuade, Superior Court, Nov. 11, 1879; Health Dept. v. Weiher, Superior Court, July 26, 1882. In two of these cases extension buildings had to be cut off and walls pulled down. As to injunction against an illegal act, see Christopher v. Mayor, etc., 13 Barb. 567; De Baum v. Mayor, 16 Barb. 392.

² In the report of the attorney and counsel of the Health Department, published in the *City Record* of New York, August 14, 1885, for the period from January 1, 1884, to July 1, 1885, three hundred and fifty-one cases under the Plumbing Law and twenty-two cases under the Tenement-House Laws were reported as sent to the attorney, but not all went to judgment when compliance was obtained previously. In the one hundred and fifty-six criminal prosecutions reported in the same period, among the judgments, on page 177, are a number under these laws, including those against King. In 1886 one Harman was sent to the penitentiary for two months, on conviction under the Plumbing Law. December 4, 1887, Ellis and White were convicted at Special Sessions and fined \$250 each, and this judgment was affirmed in General Sessions. In the Annual Report of the New York City Board of Health, 1890, page 19, are reported "Tenements included in violation notices, 857; violations referred to attorney, 300; in Report 1890, p. 53, 485 violation cases referred to attorney,

The practical consequence was, as respects violations of the law, or regulations of the Board of Health, in the use and management of lodging-houses, that the offenses were generally treated as ordinary misdemeanors, and the offenders tried at the Sessions, and found no sufficient grounds of appeal to the higher courts. The owners, lessees, tenants and occupants are all respectively ¹ made liable for any infraction of these or the other health laws in the city of New York. It is expressly made the duty of each to keep and preserve the place, apartment, room and building in such condition, and to conduct the same in such a manner that it shall not be prejudicial to life or health. Under the Tenement-House Acts, in prosecutions, "in any such action the owner, lessee and occupant, or any two of them, may be made defendants, and judgment may be given against the one or more shown to be liable, as if he were the sole defendant or defendants. In vacating a building because infected, or dangerous to life from want of repair, or unfit for habitation because of defects in drainage, plumbing, ventilation or construction, or the existence of a nuisance on the premises likely to cause sickness among the occupants, the order may be posted on the building, and served on the owner, lessee or agent, personally or by mail. The presumption under these laws is, of the liability of the owner, and, in public prosecutions, the parties or persons interested are left to distribute the responsibility among themselves. The person creating or continuing a nuisance here, as elsewhere, is liable at common law, and the general question of duty and liability for defects and nuisances, between landlord and tenant, was discussed in a previous chapter.

The Tenement-House Commission, appointed by the law of 1884 and in 1885, reported as its third recommendation for legislation as follows: "*3d. Water supply; that there shall be adequate supply for*

p. 20;" "29 tenement-houses were ordered vacated." This was under section 659, New York Consolidation Act, which is a re-enactment of the Tenement-House Laws, amended in 1887, p. 31. There are eight hundred and sixty-three civil actions for penalty under the Tenement-House Law, and three hundred and forty-eight judgments in the criminal courts, which include some under these laws.

¹ N. Y. Cons. Act, §§ 539, 665, 659, 658; chap. 908, 1867, § 16; chap. 74, 1866. In general, see chap. 11 at end and notes, and 126 N. Y. 527; N. Y. San. Code, § 205: "That the owner, lessee, tenant or occupant of any building or premises, or any part thereof, where there shall be a nuisance, or a violation of any ordinance or section of the Sanitary Code, shall be jointly and severally liable therefor, and each of them may be required to abate the nuisance, or comply with the order of the Board of Health in respect to the premises, or the part thereof, of which such person is the owner, lessee, tenant or occupant."

domestic purposes on each story that is inhabited, or intended to be occupied, by a family, either by the Croton pressure or by tanks in the upper part of the building."

"The reasons for this are obvious. We may add that nearly all the inspectors agree that the sanitary condition of houses freely supplied with water on each floor is better than that of houses not so supplied."

The law of 1887, passed in pursuance of these recommendations made in the preceding year to the legislature, contained the clause requiring tenement-houses to "have Croton or other water furnished in sufficient quantity at one or more places on each floor occupied, or intended to be occupied, by one or more families; and all tenement-houses shall be provided with a like supply of water by the owners thereof whenever they shall be so directed to do by the Board of Health," etc., and the Board of Health was required to insist upon this supply. In November, 1891, the Health Department of the city of New York had judgment in its action, in the Court of Common Pleas in the city of New York, against the Rector, etc., of Trinity Church for penalties amounting to \$200, for its violation of law in refusing to supply water on the several floors of its tenement-houses, 77 and 84 Charlton street, in said city.¹ On appeal the General Term of the same court on March 7, 1892, reversed the judgment on the ground that the law was "an unwarrantable exercise of the police power." The opinion in the Trinity Church case stated that "the postulate upon which the legislature proceeds is the duty of the government to exercise a paternal protectorate over the people. * * * A conclusion contrary to the present decision would involve the essential principle of that species of socialism under the regime of which the individual disappears and is absorbed by a collective being called the State, a principle utterly repugnant to the spirit of our political system and necessarily fatal to our form of liberty." Leave to appeal was granted by the court and an appeal was taken, but in some changes of the city administration it does not appear to have been prosecuted. The City of Rochester v. Simpson, cited in the opinion as decided below, has since then been reversed by the Court of Appeals. In

¹ N. Y. L. 1884, chap. 447; N. Y. L. 1887, chap. 84; N. Y. Cons. Act, § 663; same section amended as to cellars, chap. 486, L. 1890; id. 1891, chap. 39; N. Y. L. 1892, chap. 829, giving discretion to Board of Health in certain cases; 17 N. Y. Supp. 510; 48 N. Y. St. R. 142. This case was followed in Fire Department v. Gilmour, N. Y. Com. Pl., Gen. Term, May Term, 1893. See, also, as to reasonableness of an ordinance, Mayor, etc., v. Dry Dock, E. B. & B. R. R., 133 N. Y. 104; People v. Rosenberg, 138 N. Y. 410, 416.

Shanahan's case the court held "there is room for much bad legislation and misgovernment within the pale of the Constitution, but whenever this happens, the remedy which the Constitution provides, by the opportunity for frequent renewals of legislative bodies, is far more efficacious than any which can be afforded by the judiciary. The power of courts to overturn legislative acts, by independent inquiries as to facts, has been considered and denied in more recent cases." Since then the rule has been repeated that "legislative power is not given to the court."¹

This statutory requirement of water in tenement-houses, and, indeed, the whole section, is easily separable from the other parts of the law, unless force be given to the several re-enactments of the clauses contained in it. In the *Matter of Paul* and *Matter of Jacobs*, acts were under review which purported, by their titles, to be "to improve the public health in the city of New York," and yet their provisions were such that the Court of Appeals held the title was deceptive and said: "This law was not intended to protect the health of those engaged in cigar-making, as they are allowed to manufacture cigars everywhere, except in the forbidden tenement-houses. Nor was it intended to improve or protect the health of the occupants of tenement houses. If a store is kept for the sale of cigars on the first floor of one of these houses, and thus more tobacco is kept there than otherwise would be, and the baneful influence of tobacco, if any, is thus increased, that floor, however numerous its occupants or the occupants of the house, is exempt from the provisions of the act." *People v. Marx*, *People v. Arensberg*, *People v. Gillson*, have no reference to tenement-houses or the distinctive legislation which controls them.

The law of 1892 to regulate the manufacture and sale of clothing, wearing apparel and other articles in this State" is of a different character.² The Massachusetts laws are the same; they define their purpose in the terms of the acts, prohibiting the use of rooms or apartments used for eating or sleeping purposes in a tenement or dwelling-house, for the manufacture, in whole or part, of clothing, flowers or cigars, except by the immediate members of the family

¹ *City of Rochester v. Simpson*, 57 Hun, 36; reversed, 134 N. Y. 414; *W. W. M. Co. v. Shanahan*, 128 N. Y. at p. 359; *People v. L. I. R. R. Co.*, 134 N. Y. 506. As to the destruction of property rights discussed by Mr. Justice Ryan, see 119 N. Y. 233, 234. As to an essential part of an act, see *Matter of Mayor, etc.*, 99 N. Y. 569. See, also, *Ensign v. Barse*, 107 N. Y. 329; *Matter of Paul*, 94 N. Y. 497; *Matter of Jacob*, 98 N. Y. 98; N. Y. L., chap. 93, 1883; chap. 272, 1884; *People v. Marx*, 99 N. Y. 377; *People v. Arensberg*, 105 N. Y. 123; *People v. Gillson*, 109 N. Y. 339.

² N. Y. L. Laws, 1892 chap. 655; Massachusetts Acts and R. 1891, chap. 357; 1892, chap. 296.

living therein. Every such workshop is to be kept clean and to be subject to inspection for the purpose of ascertaining whether articles made, altered or repaired therein, are free from vermin, and whether there is any matter of infectious or contagious disease present in any workshop, or the place is in an unhealthy condition, or the clothing or materials unfit for use; and such orders may be issued by either authority, as the public health may require; and the Board of Health is directed to condemn and destroy all such infectious and contagious articles. The same course may be taken in respect to articles manufactured elsewhere, "under unhealthy conditions," and transported into the State, if, on examination, "they be found to contain vermin, or to have been made in improper places, or under unhealthy conditions, upon report thereof, to the Board of Health. So far, these laws are consistent with ancient and modern quarantine and health regulations. The inspection required and the necessary use of permits, for all such workshops, upon examination and the penalties provided, also come under familiar examples of preventive measures in health laws and remedies sanctioned by experience and by decisions of accepted weight. Further provisions¹ are that, "whoever knowingly sells or exposes for sale," any of the specified articles "shall have affixed to each of said garments a tag or label" of prescribed size, "upon which shall be legibly printed, or written, the name of the State, and city or town where such articles are made. No one shall use a fraudulent tag or label, or remove, alter or destroy it. Similar marks and designations have been required for oleomargarine packages, and stamped milk cans, and stamped bottles are provided for and protected by penal laws, under which convictions have been sustained.

¹ The conditions are within *Minnesota v. Barber*, 186 U. S. 313, and are supported by *Kimmish v. Ball*, 129 U. S. 217; and see 185 U. S. 153, 159; and *Patapsco Guano Co. v. Board of Agriculture of N. C.*, 52 Fed. R. 690; chap. 655, L. of N. Y. 1892, § 4, "Whoever knowingly sells, or exposes for sale, any coats, vests, trousers, knee-pants, overalls, cloaks, shirts, purses, feathers, artificial flowers, or cigars, which have been made in a tenement-house, used as a workshop, as specified in section 1 of this act, shall have affixed to each of said garments a tag or label, not less than two inches in length and one inch in width, upon which shall be legibly printed, or written, the name of the State and the city or town where said article or articles were made. Section 5. No person shall sell, or expose for sale, any of said articles, without a tag or label, as aforesaid, affixed thereto, nor shall sell, or expose for sale, any of said articles with a tag or label in any manner false or fraudulent. nor shall wilfully remove, alter or destroy, any such tag or label upon any of said articles when exposed for sale. N. Y. L. 1887, chaps. 377, 401; 1890, chap. 35: 1888, chap. 181: *Monroe D. Assn. v. Stanley*, 20 N. Y. Supp. 19; *People v. Cannon*, 54 N. Y. St. R. 431; *People v. Arensberg*, 105 N. Y. 123; *Lawton v. Steele*, 119 N. Y. 226.

CHAPTER XIII.

THE LIMITATION OF POLICE POWERS AND ALSO THEIR LIMITING EFFECT.

No unlimited law or authority exists even in a despotic government. In a constitutional government, limitation is the abiding principle, exhibited in its highest form in the Constitution, as the deliberative judgment of the people, moderating every claim of right or use of power. This observation is not applicable to written constitutions alone, but in one form or another will be found under the common law. Rarely, as Lord Coke and Chief Justices Hobart and Holt expressed it, the common law adjudged acts of Parliament void when against common right or reason; but more frequently the courts used that other form of interpretation wherein they determine the possible and reasonable construction, so that any injury or absurd consequences shall be avoided.¹ We have had occasion to follow this latter mode in the Girard Will case in our country, and in English cases, discussed in preceding pages, *e. g.*, Attorney-General v. Cockermouth Local Board, and Blakemore v. Glamorganshire Canal Navigation. In the last-mentioned case acts of Parliament were regarded in the light of contracts made by the legislature, on behalf of everybody interested, so that, as Lord Eldon said, they might not become instruments of oppression. Lord Chancellor Brougham said, since this decision it has been judicially held, "that the canal could not be altered even within the limits allowed by earlier acts." The Vice-Chancellor said, in *Samson v. Smith*: "In a case so constituted, I do not see, if the Attorney-General were a party, that I could make a decree that would bind the question between the defendant and the public." Thus, while we have seen the rights appertaining to the soil, to water, to air, and light and ventilation, even the

¹ 1 Kent Com. 447, 448; 18 Eq. Cas. (L. R.) 176, 177; 7 Eng. Ch. 162, 186; Lord Auckland v. Westminster L. Bd. of W., 7 Chan. App. Cas. 597; *Farrington v. Tennessee*, 95 U. S. 683, 684; *King v. Passmore*, 8 T. R. 199; see limitations on restriction of hospital for small-pox patients, *Wittington B. of H. v. Corporation of Manchester*, 68 Law Times (N. S.), 337; 48 Alb. L. J. 19; and as to private asylums for insane, *Ex parte Whitwell*, 32 Pac. R. 870.

rights of property, and such part of them as appertains to any employment in trade, limited by police powers, which extend also to the limitation of contracts, rendering some void from their inception as against public policy, or illegal, and again by legal change practically abrogating them or their continuance and destroying their remedies, we may also see these police powers themselves under limitation. Besides the judgment of "common right and reason," they may be tried in our country under two Constitutions, that of the United States and that of the State in which the question is raised.

The questions are not similar in the two tribunals. To the United States, except the necessary and inferential right of self-defense, which must, as it has been recently held, include the protection of the "peace of the United States," and some police powers as, for instance, in the obligations incident upon the control of immigration, there is neither common law or implied authority, but all not granted in terms is reserved to the States. Here it is a statutory power, first to be justified by the language of the Constitution, and secondly by enactment. Certain rules for determining the Federal questions were early formed and have been repeatedly approved, as in *Leisy v. Hardin*, where cases of exclusive power in the United States are defined." First, where the power is lodged exclusively in the Federal Constitution. Second, where it was given to the United States and prohibited to the States. Third, where, from the nature and subjects of the power, it must be necessarily exercised by the national government exclusively." The court adds that while concurrent and independent power may be exercised in other cases by the States, there is this qualification, that whenever a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, "the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the State cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States to do so, it thereby indicates its will that such commerce shall be free and untrammelled.

There is no doubt of this exclusive power, going so far in the *Gloucester Ferry* case as that it is said, commerce includes the transportation of persons and property, the navigation of public waters, the

purchase and sale of commodities, and the business of receiving and landing passengers, and "the only interference by a State with the landing and receiving of passengers, or freight, arriving by vessels from another State, or from a foreign country, which is permissible, is confined to measures to prevent confusion among the vessels, and collisions between them, to insure their safety and convenience, and to facilitate the discharge and receipt of their passengers and freight." The same rule was applied to railroads in *Husen* and *Bowman* cases, and to taxes or licenses for trade, in *Robbins v. Shelby County Taxing District*, but as the court says in *Hall v. De Cuir* in respect to the equal rights of all travellers, the difficulty has been "as to what is to be deemed an encroachment, for as has been often said, legislation may, in a great variety of ways, affect commerce and persons engaged in it, within the meaning of the Constitution.

This commerce does not, however, embrace that which is completely internal, or between different parts of the same State, even though in the carriage between two points in one State the soil of another State may be passed over; nor does this power prohibit taxation of trades and professions of resident citizens; although a part of their business may be between resident and non-resident merchants and relate to goods situated in another State.¹ And two exceptions are immediately presented by the same authority. In the *Husen* case, *Kimmish v. Ball*, and *Leisy v. Hardin*, and in many other cases, the self-protecting power of a State is affirmed, "to prevent the introduction of diseases, contagious or infectious, and of articles in such condition as tend to spread disease." Such articles are declared "not merchantable or legitimate subjects of trade," but this definition is of little assistance, for the principle lies deeper, and it never was claimed that the States were ousted of such defense, or that the law of necessity for the public welfare was barred by regulations of trade and commerce.

Again, in *Wilkerson v. Rahrer* it was ruled that the same power of Congress may provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier time than would otherwise be the case. "Liquors transported into Kansas fell at once upon arrival within

¹ 114 U. S. 196; 95 U. S. 465; 125 U. S. 465; 120 U. S. 489; 95 U. S. 487; *Crutcher v. Kentucky*, 141 U. S. 47; *Harmon v. City of Chicago*, 147 U. S. 396.

² *Lehigh Valley R. R. Co. v. Pennsylvania*, 145 U. S. 192; *Louisville, N. O. & T. R. v. Mississippi*, 133 U. S. 587; *Ficklen v. Taxing Dist.*, 145 U. S. 1; 95 U. S. 465; 129 U. S. 217; 135 U. S. 100; 140 U. S. 545; Act of Congress, August 8, 1890.

the local jurisdiction," because of an act of Congress which had the effect in the intervening period between the decisions in *Leisy v. Hardin*, and *Wilkinson v. Rahrer*. The difficulty is self-evident of drawing accurately the lines of demarcation, and it would almost seem that every case is the precedent for a very limited class. Added, however, to the principles which may be discerned in the familiar examples of the removal of a house in the path of a conflagration, as a measure of public safety, or the overruling necessity for a way where there is a foundering road, or the obstacle of a public nuisance of both public and private injury, the doctrine presented by both English and American cases may be cited in connection with *Bohan v. Port Jervis Gas Light Company* as a guide, that "the statutory authority which will justify an injury to private property, and afford immunity for acts which would otherwise be a nuisance, must be express, or must be a clear and unquestionable implication from powers expressly conferred, and it must appear that the legislature contemplated the doing of the very act which occasioned the injury."

This is a significant phrase, and the word "injury" may be applied to the result upon the inferior of conflicting interests wherever the police powers are exercised. Much discussion, however, has arisen concerning constitutional interpretation. An admirable article of late issue cites Judge Cooley as saying the Constitution is created "for the protection and perpetuation of popular rights, and on an assumption that whatever is done under it will be done in conformity with the principles which underlie that Constitution;" and quoting² Professor Tiedeman as follows: "The unwritten Constitution of the United States, within the broad limitations of the written Constitution, is just as flexible, and yields just as readily to the mutations of public opinion, as the unwritten Constitution of Great Britain. But the opponents of this theory would doubtless claim that the saving clause, within the broad limitations of the written Constitution, deprived the theory of its value. That, however, is only a superficial appearance. For, if by judicial interpretation, in obedience to the stress of public opinion or private interest, the express limitations of the written Constitution are made to mean one thing at one time, and at another time an altogether different thing, there is very little restraint imposed by these written limitations. The only obstacle in the way of an untrammelled popular

¹ 122 N. Y. 27; 128 U. S. 638; 145 U. S. 1.

² Editorial N. Y. L. Journal, April 12, 1898; 20 Wall. 655.

will is the bald letter of the Constitution ; and even that does not chain the popular will in times of great excitement and extreme necessity. This is what is meant and what has been attained by the doctrine of the implied grant of powers, which was elaborated by Chief Justice Marshall, and without which the Federal Constitution would not have lasted a half century ;" the writer adds, that the language of Mr. Justice Miller, in *Loan Association v. Topeka*, which has been so frequently quoted in the arguments concerning the constitutionality of a tariff for protection, is also in point : " There are limitations of the powers of government which arise out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. Among these is the limitation of the right of taxation, that it can only be used in and of a public object, an object which is within the purpose for which governments are established."

" The doctrine of extra-constitutional powers and restraints must be recognized within certain limits. There are, as Justice Miller suggests, certain axiomatic principles underlying all free governments which must be respected, whether expressly embodied in constitutions or not." " We do not see why the doctrine of implied restraints, deducible by fair inference from the express letter of the Constitution, should not be entitled to equal respect and authority with the doctrine of implied powers derived from the same source. So long as we proceed under the written instrument as it stands, fair inferences from its general language and spirit are admissible to supplement the written law on points on which it is silent. But when it is proposed to expressly add to or alter the instrument, does not a new rule come in ? " This suggestion conveys the answer to much of this philosophy whose feet leave the firm ground of written and intelligible law ; and until an amendment can be proposed and adopted, the tradition of the country, as well as its experience, show that peace and safety lie in the Constitution as it is, not as it might be.

Peculiar to our country is the important question, frequently recurring, of the interference of a system of State regulation with the exclusive control by Congress of commerce. Where this is found, the State law is void. It has been brought to view in every conceivable way, from the time of the earliest decisions of our highest court up to the latest ; and it may have seemed difficult to realize the declaration in *Mugler v. Kansas*, which nevertheless prevails and is still unques-

tioned, as the fundamental law of the land, that a State has power, by valid legislation, to prohibit the use of property it declares to be injurious to the health, morals or safety of the community; or that in the Ficklen case, relative to the State power, to tax all property having a *situs* within its limits, or for an occupation tax.

The autonomy of the State is sedulously guarded in these decisions. They have proceeded, in *O'Neil v. Vermont*, to a point where the guarantee of the Constitution of the United States for personal rights of supreme interest is believed to have been invaded. The dissenting opinion states them to have been denied and abridged by the judgment of the State court which is affirmed, condemning a citizen of the State of New York, who sent by express jugs containing intoxicating liquors into Vermont for sale, to imprisonment at hard labor in a house of correction for fifty-four years, two hundred and four days. On the other hand, emphasis has been given to the police power of the United States, and citing the opinions of the Supreme Court in *Tennessee v. Davis*, and *Martin v. Hunter*, the decision in *Cunningham v. Neagle*, affirms the doctrine "that the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers," and that the United States is a government with authority extending over the whole territory of the Union, acting upon the States and the people in the States. While it is limited in the number of its powers, so far as sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it."

The Passenger and Shipping Acts and decisions of England and the United States mark this tendency to assume control of whatever belongs to the general interests of protection and safety, and we may add humanity, on their ships. The assumption of quarantine, and such acts as that of 1893, requiring automatic couplers on all railroads in this country exhibit the extension of Federal police powers. With this growth commensurate with the increasing number of subjects for governmental care, there has been more or less a separation of cases along three distinct lines of decisions.

¹ 145 U. S. 1; *Ex parte Williams*, Texas Ct. Cr. A., Nov. 19, 1892; 47 Alb. L. J. 73; 144 U. S. 323; *Cunningham v. Neagle*, 135 U. S. 1; see 100 U. S. 262; 1 Wheat. 363; *O'Neil v. Vermont*, 144 U. S. 323; *Graves v. Johnson*, 156 Mass. 211, 212; *Bancher v. Maine*, 47 Me. 58; *Fisher v. Lord*, 63 N. H. 514.

First, the supremacy of the general or Federal law appears in the Crimes Act of England, in the Chinese Exclusion Act and Contract Labor Acts of the United States.¹ Upon immigration it is exclusive. In *Trinity Church v. The United States* the court construes the statute, so as to find a prohibition by its letter, not within its spirit or intent, and that the evil it designed to remedy was not the exclusion of an alien rector and pastor for a religious society in New York. Several of the cases hold that the law in question supersedes a treaty, if conflicting with it, and subsequent. In the *Horner* case, the closing of mails to any lottery enterprise is sustained.

It is evident that such a lottery law of the general government aids the lottery and gambling laws of the several States, and it is difficult to conceive of a conflict between them in this class of legislation.² Common ground may of course be reached, and the tribunals either of the States or of the United States may be called upon within their respective jurisdictions to enforce similar laws. Similar clauses are in the Constitutions, and under either or both, the inhibition of laws impairing the obligation of contracts may be invoked.

In *Hamilton Gas-Light and Coke Company v. City of Hamilton*, the same cause of action was maintainable in either national or State court, and it was held that under the circumstances, "where a city grounded its right to enact an ordinance to maintain and erect gas-works of its own, upon a State statute providing that the city council of any city should have power, whenever it was deemed expedient and for the public good, to erect gas-works, and the plaintiff contends that the statute impaired the obligation of its contract previously made, with the State and the city, the (U. S.) Circuit Court has jurisdiction of the case," although both parties were corporations of Ohio, and in this case the decision of the State court upon the question presented before it was accepted "as correctly interpreting the legislative will."

In the same way conspiracy and restraint of trade laws may be enforced wherever the violation occurs. It may be local, as the offense

¹ 50 and 51 Vict., chap. 20; see *Conybeare v. London School Board*, 17 Cox Crim. L. Cas. 3, 191; 22 U. S. Stat. at L., chap. 126; 23 Stat., chap. 220; 25 Stat. at L. 504, chap. 1064; *Chae Chan Ping*, 130 U. S. 581; 23 U. S. R. S., § 8894; chap. 908, 1890; 26 Stat. 465; *Rector, etc., T. Ch. v. U. S.*, 143 U. S. 457; *Horner v. U. S.*, 143 U. S. 570; see decision of U. S. Supreme Court on the Act of May 6, 1892 (*Geary Act*), May 15, 1893, and the dissenting opinions of Justices Field, Brewer and Fuller, C. J.; *Fong Yue Ting v. U. S.*, 149 U. S. 698.

² See, also, *Ex parte Jackson*, 96 U. S. 727; *Ex parte Rapier*, 143 U. S. 110; *Hamilton G. L. & C. Co. v. City of H.*, 146 U. S. 253.

of the retail coal dealers of Lockport, New York, cited in Niagara County Sessions, under the State law; or it may be of the general importance found by the United States Circuit Courts in the cases of *Brotherhood of Locomotive Engineers v. The Receiver of the Central Railroad and Banking Company of Georgia*, or in the case of the *Ann Arbor Railroad Company at Toledo*, wherein conspiracy under the Revised Statutes of the United States, and violations of the Interstate Commerce Law, are considered, and it is held that Congress, in the constitutional exercise of power, has given the sanction of Federal law to the rights of the complainants, against the interference with interstate and foreign commerce by strikes upon transportation lines of the country.¹ Mr. Justice Speer in the first-mentioned case says, "but for the pendency of the proceedings now under consideration by the court, there would be a strike of engineers upon every line of the Central with all the calamitous results to the public, to the road, and to the engineers, which would inevitably ensue."

*People v. Budd*² and *Budd v. New York* sustain the rule, on appeal to the national court, that the New York Act of 1888, as to elevators, is constitutional as an exercise under the police power of the State; it is not a regulation of interstate commerce and does not deprive the elevator owners of equal protection under the laws. Also, in respect to civil rights, we see what may be termed concurrent jurisdiction, and we observe in *Coosaw Mining Company v. State of South Carolina* a State as plaintiff and appellee in the United States court to restrain a public nuisance within its own borders.

Another and second line of decisions has brought into use definitions of the subject-matter, which have become familiar, relating to employments business or property "affected with a public use," or clothed with a public interest, warehouses, docks, grain elevators, water, gas, telephone, telegraph and electric-light companies and railroads. For

¹ *People v. Sheldon*, 139 N. Y. 251; 34 N. E. R. 785; *Brotherhood L. E. v. Rec. Central R. R. & B. Co.*, reported April 14, 1898; *Ann Arbor case*; *Toledo, A., & N. M. R. Co.*, 54 Fed. R. 730; U. S. Rev. Stat., § 5440, Act of Congress, 1890, "An Act to protect trade and commerce against interference, restraints and monopolies;" Act of Cong., Feb. 4, 1887; *id.*, March 2, 1889; *Leonard v. Poole*, 114 N. Y. 371; *Santa Clara V. M. & L. Co. v. Hayes*, 76 Cal. 387; *De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co.*, 14 N. Y. Supp. 277; N. Y. L. 1888, chap. 581; *People v. Budd*, 117 N. Y. 1; *Budd v. New York*, 143 U. S. 517; *People v. King*, 110 N. Y. 415; *Louisville, N. O. & T. R. Co. v. State of Miss.*, 133 U. S. 587; *Sherry v. Perkins*, 147 Mass. 212; *Spinning Co. v. Riley*, L. R., 6 Eq. Cas. 551; *Casey v. Typographical Union*, 46 Fed. R. 135.

the protection of this public interest, and because of the relation of business of certain kinds to the prosperity and welfare of the community and the State, following the practice of legislation in analogous cases, public policy has asserted and justified a right and power of supervision, and of intervention if need be, for which various reasons have been assigned.¹ "It is purely a question of legislative power," the court says in *People v. Budd*, and we must accept the authority of the statement which follows after a careful review of precedents. "These circumstances create an exceptional case and justify legislative regulation."

Mr. Justice Bradley said of a railroad, "it is chartered for the purpose of performing a duty which belongs to the State itself. It is chartered as an agent of the State for furnishing public accommodation." This is more moderately stated by Mr. Justice Earl, that "railroad corporations hold their property and exercise their functions for the public benefit, and they are, therefore, subject to legislative control." But a sufficient assumption, with regard to railroads, is that they are granted public rights, and authority is conferred upon them for the public benefit, which they can only use upon the terms and conditions of the grant. As Judge Denio says in the *Bellinger* case, it is on this account that such corporations are authorized to exercise the right of eminent domain.

The effort has been made to deduce from the charter reservations the right to regulate charges and impose burdens, which, in one case, goes so far as to require them to keep blackboards, and the time their trains are making at the stations, but it does not answer, for a reason, when we find the same control over warehouses in private hands, or an elevator built by an individual owner on his own land. Herein the very instructive opinion of Mr. Justice Peckham, in *People v. Budd*, fails to convey the full significance of the dominion now established, where the public interest is concerned. Quoting Judge Cooley and Professor Tiedeman, the language of the learned justice seems to adopt both the principle and the limitation which is characteristic of these cases. "What circumstances shall affect property with a public interest

¹ *Coosaw M. Co. v. State of S. C.*, 144 U. S. 550; see, also, *United States v. Gear*, 3 How. 120; *Attorney-General v. Forbes*, 2 Mylne & C. 128; *Attorney-General v. Jamaica Pond A. Co.*, 138 Mass. 368; 134 U. S. 418, 467; 70 N. Y. 570; *Bellinger v. N. Y. C. R. R.*, 23 N. Y. 48; *Cogswell v. N. Y., N. H. & H. Co.*, 108 N. Y. 10; *State v. Indiana & I. S. R. Co.*, 32 N. E. R. 817; *People v. Budd*, 117 N. Y. 49; *Bolt v. Stennett*, 8 Durnf. & East, 606.

is not very clear. The mere fact that the public have an interest in the existence of the business, and are accommodated by it, cannot be sufficient, for that would subject the stock of the merchant and his charge to public regulation. The public have an interest in every business which an individual offers his wares, his merchandise, his services and his accommodations to the public, but his offer does not place him at the mercy of the public in respect to charges and prices. If one is permitted to take upon himself a public employment with special privileges, which only the State can confer, the case is clear enough. Judge Cooley's view is that "if by public permission one is making use of the public property, and he claims to be the only one with whom the public can deal, in respect to the use of that property, it seems entirely reasonable that his business is affected with a public interest which requires him to deal with the public on reasonable terms."

A proper illustration comes from the old case of *Bolt v. Stenner* where a crane was set up by its owners on a public quay, a license presumed, and the "compensation for its use" properly limited to a reasonable sum. Under the Mill-right cases previously noticed, the same consequences would naturally follow. *Munn v. Illinois* presents another characteristic feature in the opinion, that when one is engaged in a public business in which all the public have a right to require services, the legislature can regulate the exercise of this public function and public duty so far as to limit the amount of charges that should be made for such service.

It seems a single step in advance, when the decision of the *Bolt* case is made to cover, *pari passu*, the case of *Pinto*, the owner of a stationary elevator, built on private grounds, not on grounds devoted to a public use, like the right of way of a railroad company, with nothing on his part "to indicate a purpose to dedicate his property to public uses. So far as it is possible to make the business of an elevator a purely private business, he has done so," is the comment of Mr. Justice Brewer, with whom Justices Field and Brown concur. *Annals* case, also decided, was of a floating elevator, private as he claimed, but with this added burden of a public interest by the judgments of both the State and the national courts.

In *People, ex rel. Kimball, v. Boston and Albany Railroad*, the Court of Appeals of New York held, that appropriate regulations of railroads were within the domain of legislative power, although the power to alter and amend the charter of such corporations has not been

reserved.” In *Dow v. Beidelman*, it was held that “railroad companies are subject to legislative control, as to their rates of fare and freight, unless protected by their charters. In the absence of any legislative regulation upon the subject, the courts must decide for the company, as they do for private persons when controversies arise, what is reasonable. Where property has been clothed with a public interest, the legislature may fix a limit to that which in law shall be reasonable for its use. This limits the courts as well as the people.” No valid reason can exist for a discrimination in favor of telephone, telegraph, gas, and other public service, by private companies, holding in their grasp certain parts of the carrier business, to which public policy applies with equal force against unjust prices and conditions, as it does in the business of other carriers, and we see the public interest with its hand of power, extending to them all.¹ Constantly our courts revert, in any new contention, to the rule that “all property is held subject to those general regulations which are necessary to the common good and general welfare,” and sufficient power of intervention to secure these objects rests with the legislature continuously.

Of this police power, and the attendant duty, the State cannot by contract or grant divest itself, and grants and contracts are frequently altered, changed, or affected, by this essential and continuing power. A recent telegraph case, where stipulations on the printed telegraph blank relieving the defendant from liability were set up, shows the change in public policy and the judicial change of construction now to be followed in the light of experience and more thorough investigation.

The court says, “as the art of telegraphy has now attained such high efficiency, there is less reason why any rule or safeguard to the public should be relaxed. The principles of law are always the same, but they extend their grasp and take on the necessity for those new

¹ 148 U. S. 551, 552; 70 N. Y. 571; *Dow v. Beidelman*, 125 U. S. 841.

² Railroad Commission cases, 116 U. S. 807, and limitations; *Chicago, M. & St. P. R. R. Co. v. Minnesota*, 134 U. S. 418. As to reservation in grants, see 146 U. S. 270, 271; *Bertholf v. O'Reilly*, 74 N. Y. 509; *People v. L. I. R. R. Co.*, 184 N. Y. 506; *Com. v. Alger*, 7 Cush. 84; *Thorpe v. R. & B. R. R. Co.*, 27 Vt. 140; *State v. Columbus Gas-Light Co.*, 34 Ohio St. 572; *Nash v. Page*, 80 Ky. 539; *Girard Pt. Storage Co. v. Southwark F. Co.*, 105 Pa. 248; *Webster Telephone case*, 17 Neb. 126; *Hackett v. State*, 105 Ind. 250; *Chesapeake & P. Telegraph Co. v. Balt. & O. Tel. Co.*, 66 Md. 369; *Zanesville v. Zanesville Gas-Light Co.*, 47 Ohio St. 1; *Del., L. & W. R. R. v. Central Stock Yard & Tel. Co.*, 45 N. J. Eq. 50; *Beer Company v. Mass.*, 97 U. S. 25. As to the right of waste or destruction of one's own property, see *Hague v. Wheeler*, 27 Atl. R. 714, and abstract of the case, chap. XIX; *Minn. & St. Louis Ry. Co. v. Emmons*, 149 U. S. 364.

things which the advance in science and art provide for public safety and convenience, and require them to be used." This opinion states the "true principle is that telegraph companies are such corporations created for the public benefit, endowed with special privileges, such as the right of eminent domain, performing the most important functions of commerce, and in cases where celerity and dispatch are necessary, taking the place of the postal service; that, at least, ordinary skill and diligence are required of them, and that public policy forbids they should be protected from liability for damages by reason of any degree of negligence."

This supervision of interests, and exercise of public protective authority, has full effect only within a limited sphere, whatever its origin. We do not expect the national public, through Parliament, or Congress or the court, to intervene in purely local or private concerns where it is not necessarily a party. This has appeared repeatedly; and in England we have seen not only the refusal by the court of the suggestion that the Attorney-General be made a party, but also permission given to a private individual to carry on a suit which the public officers would abandon and citizens were interested to maintain. Two recent decisions of the United States Supreme Court support this view, which, however, has full expression in *Wilkerson v. Rahrer*.¹ In *Lehigh Valley Railroad Company v. Pennsylvania*, it is said: "The grant to Congress to regulate commerce among the States does not embrace that commerce which is completely internal or between different parts of the same State." In *Ficklen v. The Taxing District of Shelby County* are upheld taxes upon trades and occupations of resident citizens, although they may touch upon sales between resident and non-resident merchants, and taxes upon "all property having a *situs* within its limits, whether employed in interstate commerce or not." In *Kimball v. Ball*, the court does not entertain the slightest doubt that the State may provide that whoever permits diseased cattle in his possession to run at large within its limits shall be liable for any damage caused by the spread of the disease, and sustains the law of Iowa, directed to restrictions upon the possession of Texas cattle which have

¹ *Brown v. Postal Tel. Co.*, 111 N. C. 187; *Gillis v. Tel. Co.*, 61 Vt. 461; *Ayer v. Tel. Co.*, 79 Me. 493; *Rittenhouse v. The Ind. L.*, 44 N. Y. 263; see 124 N. Y. 36; *West. U. Tel. Co. v. Hall*, 124 U. S. 444; *U. S. Tel. Co. v. Wenger*, 55 Pa. St. 33; *Squire v. West. U. Tel. Co.*, 98 Mass. 282; *Thompson v. West. U. Tel. Co.*, 64 Wis. 581; *Gray Com. Tel.*, chap. 5, § 51; *Thom. Elect.*, chaps. 6, 8.

² 140 U. S. 545; 145 U. S. 192; 145 U. S. 1; 129 U. S. 217.

not been wintered North, holding that *Railroad Company v. Husen* was not adverse, because, in that case, the discrimination had not been against diseased cattle, but the law of Missouri forbade the transportation, and interposed "a direct prohibition against the introduction of all Texas, Mexican or Indian cattle during eight months of the year," no matter whether free from disease or not, and even if brought in for the purpose of carrying them through the State without unloading. Such a statute, the court held, was not a quarantine law, but a law which interfered with interstate commerce, and therefore invalid.

The quarantine regulations of the States have hitherto been observed, and in the law of 1893 the Secretary of the Treasury is required to "co-operate with and aid State and municipal Boards of Health, in the execution and enforcement of the rules and regulations made by the Secretary of the Treasury, to prevent the introduction of contagious or infectious diseases," etc.¹ State statutes, providing for the improvement of rivers, bays and harbors, the construction of bridges, the jurisdiction and control of wharves, and charges and dues for these purposes, and for sanitary examinations of vessels passing quarantine, and licenses of locomotive engineers within the State, and taxation upon transportation receipts within the State, and of the owners of an express company and railroad company within State limits, and of a bridge across a river between two States, have been sustained.²

The courts have refused to interfere to protect property even from oppressive taxation, and have held that a tax upon the franchise or business of a foreign corporation is not a tax on interstate commerce. In *Wiggins Ferry Company v. St. Louis* the court said, "the exaction of a license fee is an ordinary exercise of the police power by municipal corporations. When, therefore, a State expressly grants to an

¹ Act of April 15, 1893, "An act granting additional quarantine powers and imposing additional duties upon the Marine Hospital Service."

² *Mobile Co. v. Kimball*, 102 U. S. 691; *Escanaba & T. M. T. Co. v. Chicago*, 107 U. S. 678; *Parkersburg & O. R. T. Co. v. Parkersburg*, 107 U. S. 691; *Brown v. Houston*, 114 U. S. 632; *Morgan S. S. Co. v. Louisiana Bd. H.*, 118 U. S. 455; *Smith v. Alabama*, 124 U. S. 465; *Nashville C. & St. Co. v. Alabama*, 128 U. S. 96; *Henderson Bridge Co. v. Henderson*, 141 U. S. 679; *Pullman P. Co. v. Pa.*, 141 U. S. 86; *Pacific Express Co. v. Serbert*, 142 U. S. 339; *N. Orleans City & R. Co. v. N. O.*, 143 U. S. 192; *Horn Silver M. Co. v. St. of N. Y.*, 143 U. S. 305; *Lehigh V. R. v. Pa.*, 145 U. S. 192; *Wiggins F. Co. v. E. St. Louis*, 107 U. S. 365; *State Freight Tax*, 15 Wall. 232; *Henderson v. New York City*, 92 U. S. 259; *Cook v. Pa.*, 97 U. S. 566; *Wabash & St. L. R. R.*, 118 U. S. 557.

incorporated city, as in this case, the power to license, tax and regulate ferries, the latter may impose a license tax on the keepers of ferries, although their boats ply between landings lying in two different States, and the act by which this exaction is authorized will not be held to be a regulation of commerce." But taxes or restrictions upon the transmission of persons or property, or telegraph messages from State to State, or head-money on passengers arriving in the State, or tonnage dues have been held void. So also taxes on auctioneers' sales of imported goods, and on drummers selling by sample wares belonging to citizens of other States, and license fees discriminating against persons or manufacturers of another State. A telegraph company as a carrier of messages is equally an instrument of commerce, as a carrier of goods, and a tax by the State of Texas on all messages carried within its borders is forbidden by the commerce clause of the Constitution, as a tax upon commerce among the States is the ruling in *Telegraph Company v. Texas*.¹ In *McCall v. California* it was held that an agency of a line of railroad between Chicago and New York, established in San Francisco for the purpose of inducing passengers to take that line at Chicago, but not selling tickets or receiving or paying out money, "is an agency engaged in interstate commerce, and a license tax upon the agent was unconstitutional." In *Voight v. Wright*, the court, in passing upon the Virginia law for the inspection of flour, remarks that in the note to *Turner v. Maryland*, "in which is contained a list of the various inspection laws of the States, we do not observe any laws which seem to provide for the inspection of articles other than those which are the product of the State, and this generally with a view to preparing them for exportation," and holds that "a State cannot, under the guise of enacting inspection laws, make discrimination against the products and industries of other States in favor of its own products and industries."²

¹ *Telegraph Co. v. Texas*, 105 U. S. 460; *Robbins v. Shelby County Tax. D.*, 120 U. S. 489; *Crutcher v. Kentucky*, 141 U. S. 47; *Welton v. Missouri*, 91 U. S. 275; *Walling v. Michigan*, 116 U. S. 446; *Voight v. Wright*, 141 U. S. 62; *Brimmer v. Rebman*, 138 U. S. 78; *Minnesota v. Barber*, 136 U. S. 313; *McCall v. California*, 136 U. S. 104; see *Le Loup v. Port of Mobile*, 127 U. S. 640; *Gloucester Ferry Co. v. Pa.*, 114 U. S. 196.

² Such decisions as *McCall v. California*, and *Voight v. Wright*, work the same effect as though purely police laws, although they are generally otherwise classed. The consequence of a different policy as, *e. g.*, that discrimination should be allowed between persons and goods, show the necessity for such laws overruling small and local advantages, which do not involve vital interests for the larger public welfare

State of Minnesota v. Barber goes further in declaring a statute of Minnesota void, which required as a condition of sales in that State of fresh meat for food, that the animals should have been inspected there before being slaughtered, saying, that a burden imposed by a State upon interstate commerce is not to be sustained, simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute." The necessity for such a rule is explained more at length in *Wabash Railway Company v. Illinois*, and the remark of Mr. Justice Miller, in the prevailing opinion, is applicable: "It would be a feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States, which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of this transportation must be done could impose regulations concerning price, compensation, or taxation, or any other restrictive regulation, interfering with and severely embarrassing this commerce."

The third line of the decisions referred to embraces decisions upon the police powers, and police rights, reposing in the State, of which it cannot divest itself by contract or grant.¹ We have the general proposition, that "corporations cannot by contract abridge their legislative power" applied to lands conveyed for the purposes of a church and cemetery, with a covenant of quiet enjoyment, from the city of New York, and subsequently by a law of the same corporation under a power granted by the legislature, the use of these lands as a cemetery was prohibited, and the early English cases are cited to the effect that "where one covenants to do an act which is lawful, and an act of Parliament comes in and hinders him from doing it, the covenant is repealed."

In *Butchers' Union Company v. Crescent City Company*, the United States Supreme Court declares that "while we are not prepared to say that the legislature can make valid contracts on no subject embraced in

and constitutional order. The Interstate Commerce, Civil Rights and Conspiracy Laws are essentially police legislation. *Wabash, St. L. & P. R. R. Co. v. Illinois*, 118 U. S. 557, 575, 585.

¹ *Presby. Ch. v. City of N. Y.*, 5 Cow. 538; *Met. Bd. Excise v. Barrie*, 84 N. Y. 657; *Brewster v. Kitchin*, 1 Salk. 198; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746; *Beer Co. v. Mass.*, 97 U. S. 25; *Stone v. Mississippi*, 101 U. S. 814; *New Orleans G. L. Co. v. Louisiana*, 115 U. S. 667; *Scovill v. McMahon*, 26 Atl. R. 479; 63 Conn. 378.

the largest definition of the police power, we think that in regard to two subjects so embraced, it cannot by any contract limit the exercise of those powers, to the prejudice of the public welfare. These are the public health and the public morals." The legislative discretion to provide by appropriate measure for the protection of the lives, health, and property of the citizens, and the preservation of good order and public morals, "can no more be bargained away than the power itself," is the remark of Mr. Justice Bradley, cited in this opinion from a former case. In *Stone v. Mississippi*, it was held, that any one accepting the grant of a lottery, does so with the implied understanding, that the only right acquired by the grantee, whether paid for or not, is a suspension of certain governmental rights subject to withdrawal at will. "No legislature can bargain away the public health or public morals. The people themselves cannot do it, much less their servants." The supervision of these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require."

In the Railroad Commission cases,¹ it was held that a "statute which grants to a railroad company the right, from time to time, to fix, regulate and receive the tolls and charges by them to be received for transportation," does not deprive the State of its power within the limits of its general authority, as controlled by the Constitution of the United States, to act upon the reasonableness of the tolls and charges so fixed and regulated. "Exemption from taxation is never to be presumed. The legislature cannot be held to have intended to surrender the taxing power, unless its intention to do so has been declared in clear terms," is the rule of *New Orleans City and Lake Railroad v. The City of New Orleans*. In *Stein v. Bienville Water Supply Company*, the court says: "We are forbidden to hold that a grant under legislative authority, of an exclusive privilege for a term of years, of supplying a municipal corporation and its people with water, drawn by means of a system of water-works from a particular stream or river, prevents the State from granting to other persons the privilege of supplying, during the same period, the same corporation and people, with water drawn in like manner from a different stream or river." In *Hamilton Gas-Light and Coke Company v. The City of Hamilton*, where many of these cases are reviewed, it is held that "a grant under legislative authority, by a city, of an exclusive privilege, for a term of

¹ Railroad Commission cases, 116 U. S. 307, 352.

years, of supplying the city and its people with gas, does not prevent the city from erecting its own gas-works under a State law giving it power to do so." In this case is further expounded the "established rule that public grants susceptible of two constructions must receive the one most favorable to the public;" and also, that not every statute which affects the value of a contract impairs its obligation.¹ "It is one of the contingencies to which parties look now in making a large class of contracts that they may be affected in many ways by State and national legislation. If parties wish to guard against contingencies of that kind, they must do so by clear and explicit language," etc. This clearly can only be done, and contracts freed from this influence, in matters of franchises, and taxes and burdens, which touch no other than property interests, and do not imperil graver responsibility which cannot be divested.

It was said in *New Orleans Gas Company v. Louisiana Company* that if the State can by contract restrict the exercise of her power to construct and maintain highways, bridges and ferries, by granting to a particular corporation the exclusive right to construct and operate a railroad between given points, or a ferry over one of her navigable streams within designated limits; if she may restrict the exercise of the power of taxation to particular individuals and corporations, "it is difficult to perceive upon what ground we can deny her authority — when not forbidden by her own organic law — in consideration of money to be expended, and important services to be rendered, for the promotion of the public comfort, the public health, or the public safety, to grant a franchise to be exercised exclusively by those who thus do for the public what the State might undertake to perform either by herself or by subordinate municipal agencies."²

In *Farrington v. Tennessee* the charter of a bank providing that the bank "shall pay to the State an annual tax of one-half of one per cent on each share of the capital stock to be subscribed, which shall be in

¹ *N. O., C. & L. R. v. City of N. O.*, 143 U. S. 192; *Chicago, M. & St. P. R. v. The State of Minn.*, 134 U. S. 418; *Stein v. B. W. S. Co.*, 141 U. S. 67; *Wash. & B. Turnp. Co. v. Maryland*, 8 Wall. 210; *Butchers' Union & C. Co. v. Crescent City Co.*, 111 U. S. 746; *Hamilton G. L. Co. v. City of Hamilton*, 146 U. S. 258; *Curtis v. Whitney*, 13 Wall. 68; *Greenwood v. Union Freight R. Co.*, 105 U. S. 13; *Lehigh Water Co. v. Easton*, 121 U. S. 388; *Memphis Gas Company v. Shelby County*, 109 U. S. 109.

² *New Orleans G. Co. v. Louisiana L. Co.*, 115 U. S. 665; *Gordon v. Appeal Tax Ct.*, 3 How. 183; *Farrington v. Tennessee*, 95 N. Y. 679; *New Orleans v. Rivers*, 115 U. S. 674; *Tennessee v. Whitworth*, 117 U. S. 129; *New Orleans v. Houston*, 119 U. S. 265; *Tammany Water-works v. N. O. W. Works*, 120 U. S. 64.

lieu of all other taxes," it was held that a subsequent revenue law of the State imposing an additional tax on shares in the hands of stockholders was void. In *Tennessee v. Whitworth* a State statute incorporating a railroad company and providing that the capital stock shall be forever exempt from taxation, and that the road, with all its fixtures and appurtenances, shall be exempt from taxation for the period of twenty years and no longer, was held to exempt the shares in the hands of various holders in the State, and this right passed into new shares issued in exchange upon a consolidation of two railroad corporations of the State having the like privilege. In *New Orleans v. Houston* it was held that "a grant in the Constitution of a State, of a privilege to a corporation, is not subject to repeal or change by the legislature." *New Orleans Water-works Company v. Rivers* sustained "a legislative grant of an exclusive right to supply water to a municipality and its inhabitants through pipes and mains laid in the public streets, and upon condition of the performance of the service by the grantee." It was held the grant of "a franchise vested in the State, in consideration of the performance of a public service by the grantee, is a contract protected by the Constitution of the United States against legislation to impair it. It is violated by a grant to an individual in the municipality of the right to supply his premises with water by means of pipes so laid." This was not the case of riparian rights, but the defendant had obtained a privilege to lay a water pipe through the streets to his hotel, many blocks from the river, and there was a decree of perpetual injunction restraining him from laying pipes, conduits and mains in the public ways of New Orleans, for this purpose.

In *St. Tammany Water-works v. New Orleans Water-works* the *Rivers* case is affirmed, but the court adds, no question arises in this case, as to whether the State or municipal government may not, if the public health or the public comfort so require, compel the appellee, or if it refuses, employ other means, to supply water from some river or stream other than the Mississippi. The city had not assented to the use of the streets by the appellant, "nor has it, so far as the record shows, determined that the public health would be better protected, or the public comfort subserved" by a different water supply. "These are matters which neither the appellant nor the individual citizens may determine for the constituted authorities."

The *Slaughter-House* cases maintained this prerogative, and also distinguished the cases wherein it may properly be exercised, holding, as is shown in the opinion of the court in the *New Orleans Gas Com-*

pany case, that the act giving to a corporation the exclusive right, for twenty-five years, to have and maintain slaughter-houses, landings for cattle, and yards for inclosing cattle intended for sale or slaughter within the territory mentioned, guarded by proper limitation of the prices to be charged, and imposing the duty of providing ample conveniences, "was a police regulation for the health and comfort of the people, within the power of the State legislature, unaffected by the Constitution of the United States.¹ The power is of a class always exercised by Parliament, and by the State legislatures, and until now, this opinion asserts, "has never been denied." This characteristic of the police power is the basis for the distinction drawn in the later case of the Butchers' Union Company wherein it was held that the obligations of a contract could not arise out of such a police regulation.

This field, of the propositions discussed in this chapter, and especially of rights under contracts and grants of the State, has been thoroughly explored, and two decisions of the United States Supreme Court mark its limits with exactness. The legislature of Ohio had, upon the fulfilment of certain terms and conditions by the proprietors or citizens of Canfield, in Mahoning county, Ohio, established permanently the county seat at that town. Subsequently an act was passed providing for its removal to Youngstown, and Newton and other citizens of Canfield filed their petition against the Board of County Commissioners, praying for an injunction, which was denied. The petition was dismissed and the judgment affirmed on appeal.

Mr. Justice Swayne, delivering the opinion of the court at the October term, 1879, says: "Undoubtedly there are cases in which a State may, as it were, lay aside its sovereignty, and contract like an individual, and be bound accordingly. The cases in which such contracts have been sustained are numerous. Many of them are cases in which the question was presented, whether a private act of incorporation, or one or more of its clauses, is a contract within the meaning of the Constitution of the United States. There is no such restraint upon the British Parliament. Hence the adjudications of that country throw but little light on the subject. The Dartmouth College case was the pioneer in this field of our jurisprudence. The principle there laid down, and since maintained in the cases which have followed and been controlled by it,

¹ Slaughter-House cases, 16 Wall. 36; see 115 U. S. 668; 111 U. S. 750.

² Newton v. Commissioners, 100 U. S. 548, 556; Blakemore v. The Glamorganshire Canal Nav., 7 Eng. Ch. 154, p. 186, "considered the acts as forming a contract between the company and the neighboring proprietors."

has no application, where the statute in question is a public law relating to a public subject, within the domain of the general legislative power of the State and involving the public rights, and public welfare of the entire community affected by it. Chief Justice Marshall said: "Anterior to the formation of the Constitution a course of legislation had prevailed in many, if not all of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with the faithful performance of engagements. To correct this mischief by restraining the power which produced it, the State legislatures were forbidden to pass any law impairing the obligation of contracts, that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and since the clause in the Constitution must, in construction, receive some limitation, it may be confined to cases of this description, to cases within the mischief it was intended to remedy." * * *

"The legislative power of a State, except so far as restrained by its own Constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service, and it may increase or diminish the salary or change the mode of compensation. The police power of the States, and that with respect to municipal corporations, and to many other things that might be named, are of the same absolute character. In all these cases there can be no contract and no irrepealable law, because they are governmental subjects, and hence within the category before stated. Every succeeding legislature possesses the same jurisdiction and power, with respect to them, as its predecessors. The latter have the same power of repeal and modification which the former had of enactment." "But conceding, for the purposes of this opinion, that there is here a contract, to what does it bind the State?" "There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists it is to be rigidly scrutinized and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require. There must have been a deliberate intention clearly manifested on the part of the State to grant what is claimed." Nothing is to be conceded.¹ "The affirmative must be shown. Silence is negation and doubt is fatal to the claim."

¹ 13 Ill. 468; see 88 Fed. R. 780; 7 How. 185; 9 How. 81; *Meyer v. Teutopolis*, 181 Ill. 552; *People v. N. Y. & S. I. F. Co.*, 68 N. Y. 71; *Blundell v. Cotterall*, 5 Barn. & A. 268; *Hoboken v. Pa. R. R.*, 124 U. S. 657; *Stevens v. Patterson*, 84 N. J. L. 532.

In *Harris v. Shaw* land was conveyed on condition that the county seat should be permanently located upon it, but some years later the county seat was removed. The court said it was no part of the contract that the county seat should remain forever on the premises; that "the grantor must be presumed to have known that the legislature had the power to remove it at pleasure and to have had in view, at least, the probability of such a change when he made the deed." The phrase "permanently established" was shown to be "a formula in long and frequent use in Ohio, with respect to county seats, established otherwise than temporarily;" but the court adds: "It is believed this is the first instance in the juridical history of the State, in which such a claim as is here made, has been set up."

In the Lake-front cases, decided in December, 1892, a summary is given of the many elements entering into this exhaustive decision, which cannot be passed over in the consideration of kindred topics. An act of Illinois, of April 16, 1869, purporting to grant to the Illinois Central Railroad Company all the right and title of the State to the submerged lands constituting the bed of Lake Michigan, for one mile from the shore, opposite the company's tracks and breakwater in the city of Chicago, to be held in perpetuity, without power to alienate the fee," is declared to be "in excess of the legislative power of the State, and inoperative to affect, modify, or in any respect control, the sovereignty and dominion of the State over such lands or its ownership thereof, and was annulled by the Repealing Act of April 15, 1873, which was valid and effective to that extent." "The reclamation by the railroad company, from the waters of the lake, of a tract two hundred feet wide, extending along the front of the city of Chicago, and the construction of its tracks, crossings, guards, etc., and the erection of the breakwater on the east thereof, and the necessary works for the protection of the shore on the west, as required by the ordinance under which it was permitted to enter the city, do not interfere with any useful freedom in the use of the waters of the lake, for commerce foreign, interstate, or domestic, or constitute such an encroachment upon the domain of the State, as to require the interposition of a court for a removal of, or any restraint in, their use." By such reclamation the railroad only acquired a right of way for railroad purposes, but neither an absolute fee in the lands reclaimed, nor riparian rights, nor the right to reclaim further lands for its use, or for the construction of piers, docks and wharves, in furtherance of its business. In respect to lots purchased by the company, "it was vested with riparian rights,

and became entitled to fill up shallow waters of the lake, and to construct piers, wharves, docks and slips, not extending beyond the front of navigability."

The fee in the streets, alleys, commons and public grounds, lying on the lake-front of Chicago, "is vested in the city, together with riparian rights, and these rights were not divested by the fact, that the Illinois Railroad Company occupied the lands underlying the immediate front, and filled them in for its right of way, under authority of a city ordinance; and the city still has the right to exercise such riparian rights subject to the terms of the ordinance and to the authority of the State to prescribe the laws, beyond which no structure may be extended, and also subject to such supervision and control as the United States may lawfully exercise."¹

"The title which a State holds to lands under the navigable waters of the great lakes lying within her limits, is held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, have liberty of fishing therein, free from obstruction or interference by private parties, and it is not within the legislative power of the State to surrender its property and general control over the lands of an entire harbor, bay, sea, or lake, though it may grant parcels thereof for the formation of wharves, piers, docks, and other structures, in aid of commerce or parcels, which being occupied, do not seriously impair the public interest in the waters remaining."

The court says: "We agree with the court below that, to a clear understanding of the numerous questions presented in this case, it was necessary to trace the history of the title to the several parcels of land claimed by the company, and the court in its elaborate opinion referred to the legislation of the United States, and of the State, and to ordinances of the city, and proceedings thereunder. We shall assume the correctness of that history." * * * "At one time the existence of tide-waters was deemed essential in determining the admiralty jurisdiction of courts in England. That doctrine is now repudiated in this country as wholly inapplicable to our condition. In England the ebb and flow of the tide constitute the legal test of the navigability of waters. But in this country the case is different." * * * "We

¹ Illinois Central R. R. Co. v. Illinois; City of Chicago v. R. R.; State of Illinois v. R. R., 146 U. S. 387; 33 Fed. R. 730; The Genesee Chief v. Fitzhugh, 12 How. 443; Yates v. Milwaukee, 10 Wall. 497; Act of Congress, Sept. 20, 1850, 9 Stat., chap. 51, or ordinance of the city of Chicago, June 14, 1852, L. of Illinois, Feb. 17, 1851; Act of April 16, 1869; Act of April 15, 1873; Gould Waters, § 148.

hold that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the great lakes applies, which obtains at the common law, as to the dominion and sovereignty over and ownership of lands under tide waters and the borders of the sea, and that the lands are held by the same right in one case as in the other, and subject to the same trusts and limitations."

The deduction of title under which claims are made is three-fold. By an act of Congress, in 1850, a grant was made to the State of a right of way through public lands for the construction of a railroad, accepted by the State by act of the legislature in 1851, and just previous to this acceptance the Illinois Railroad Company was incorporated with authority to survey, locate, construct and operate a railroad, and it might appropriate to its sole use and control, for the purposes contemplated, land not exceeding two hundred feet in width throughout its entire length, and might enter upon, take possession of and use any lands, streams and materials necessary. "All such lands, waters, materials and privileges belonging to the State were granted to the corporation for that purpose." "It was also enacted that nothing in the act should authorize the corporation to make a location of its road within any city, without the consent of the common council. This consent was given by the common council of Chicago upon conditions to be performed by the company. "It also declared that the company might enter upon and use, in perpetuity for its line of road and other works necessary to protect the same from the lake, a width of three hundred feet" between certain designated points, and extend its works and fill out into the lake. The railroad was allowed ninety days to accept this ordinance, and upon such acceptance a contract should be made and delivered between the city and the company. Such formal acceptance and agreement followed. * * *

An act of the legislature in 1869 confirming the right of the railroad company under the grant from the State to certain submerged lands upon conditions fixed, under which "the said company pays to the State at least seven per cent of its gross earnings, was accepted by the company. April 15, 1873, the legislature of Illinois repealed the act. * * * The opinion continues. "The position advanced by the railroad company in support of its claim to the ownership of the submerged lands, and the right to the erection of wharves, piers and docks at its pleasure, or for its business in the harbor of Chicago, would place any harbor in the country at the mercy of a majority of the legislature of the State in which the harbor is situated."

"We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of a private corporation. But the decisions are numerous which declare that such property is held by the State by virtue of its sovereignty in trust for the public." * * * "The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things must vary with varying circumstances. The legislation which may be needed one day for the harbor, may be different from the legislation that may be required at another day. Every legislature must, at the time of its "existence, exercise the power of the State in the execution of the trust devolved upon it."

The limiting effect of police laws extends to agreements between private persons. Under them the conditions and relations may totally change, or be modified, or all remedy by action be lost. To gaming contracts,¹ as we have already seen, the courts refuse their aid; and it matters little whether the act or thing be prohibited, or immoral, and subject of contract is an outcast in law. In seizures and forfeitures created by a statute *in rem*, it has been said the thing is primarily considered the offender, "or rather that the offense attached primarily to the thing, whether the offense be *malum prohibitum* or *malum in se*." That a liability not contemplated may often attach, landlords have frequently experienced under Civil Damage and Revenue Acts.² No constitutional rights are interfered with when the government determines that the manufacture and sale of intoxicating drinks, for use as beverages, is a business in which no one may lawfully engage, and the State has power to declare that any place kept and maintained for such purpose is to be deemed a public nuisance and abated.

Wherever any contract is manifestly in furtherance of immorality, and tends directly to contaminate the public mind, or is directly forbidden, it will be utterly void.³ Yet it may be that the contract has been completed and the price paid; in such cases it has been held it

¹ *Tatam v. Reeve*, 87 L. T. R. (N. S.) 688; *Stone v. Miss.*, 101 U. S. 814; *Miller v. Ammon*, 145 U. S. 421; *Lester v. Buel*, 49 Ohio, 240. See *Ernst v. Crosby* 140 N. Y. 364.

² *Bertholf v. O'Reilly*, 74 N. Y. 509; *Dobbins Distillery v. U. S.*, 96 U. S. 395; *Mugler v. Kansas*, 123 U. S. 628; *Wilkerson v. Rahrer*, 140 U. S. 545; also, 154 Mass. 388; 2 Pars. Cont. 678; *Benj. Sales*, § 517; 49 Ohio, 447; *Story Sales*, §§ 486, 488, 505; *Jones v. Surprise*, 64 N. H. 248; 1 *Story Eq. Jur.*, § 294.

³ *Story Sales*, § 509; *Hull v. Ruggles*, 56 N. Y. 424.

will not be set aside either in law or in equity, for neither will meddle with corrupt contracts, either to enforce them, or to afford redress to a guilty party. Mr. Story adds very forcibly "the rule is not limited to contracts which are in direct and immediate violation of law, but if a bargain of sale be made for the express purpose of furthering a violation of law, it will be void."

He illustrates the proposition by the sale of drugs to a brewer, to be used in his brewery contrary to the provisions of the statute, and the price could not be recovered, although it was not proven that the drugs were actually used; also, goods sold and delivered aboard a ship for the East Indies when such contracts had been prohibited, and the vendor could not recover in an action on the bond given for the price.¹ So, in a sale of spirituous liquors, with knowledge they are to be used in violation of law, and an arrangement made to aid the purchaser to evade the penalties of the statute, the price of the liquors cannot be recovered. This was the consequence in *Jones v. Surprise*, in New Hampshire, where orders were taken in the State for liquors to be delivered outside of the State, with reasonable cause for the vendor to believe they were to be transported into the State, and there sold in violation of law, and the vendor could not recover the price, although the sale was lawful where made. The court holds that "a rule of comity does not require the people to enforce in their courts any contract injurious to their public rights, or that offends their morals, or contravenes their policy, or violates public law." Judge Story says: "Mr. Justice Best with great force said, that in cases turning upon the comity of nations, it is a maxim that comity cannot prevail in cases where it violates the law of our own country, or the law of nature, or the law of God. Contracts, therefore, which are in evasion or fraud of the laws of a country, or of the rights or duties of its subjects; contracts against good morals, or against religion, or against public rights, and contracts opposed to the national policy or national institutions, are deemed nullities in every country affected by such considerations; although they may be valid by the laws of the place where they are made.

Indeed, a broader principle might be adopted, and it is to be regretted that it has not been universally adopted by all nations, in respect to foreign contracts, as it has been in respect to domestic contracts, that

¹ *Story Sales*, § 505; *Jones v. Surprise*, 64 N. H. 248; *Webster v. Munger*, 8 Gray, 584; *Story Conf. L.*, §§ 244, 245; *Forbes v. Cochrane*, 2 Barn. & C. 448, 471; *Armstrong v. Toler*, 11 Wh. 258; *Cod. 2*, lib. tit. 816; *Graves v. Johnson*, 156 Mass. 211.

no man ought to be heard in a court of justice, to enforce a contract founded in, or arising out of, moral or political turpitude, or in fraud of the just rights of any foreign nation whatsoever. The Roman law contains an affirmation of this wholesome doctrine." In *Hull v. Rugles*, plaintiff had sold to defendants a quantity of candies and silverware. "The candies were put up in packages known as 'prize packages,' and in some of the packages were tickets with the name of a piece of silverware upon it. The intent of the defendants was to sell the packages for more than the value, the purchaser taking the chance of getting a package containing a ticket, entitling him to the article of silverware named, in addition to the package." It was held that this was a lottery within the meaning of the statute; that the sale, having been for the purpose of aiding in a lottery, was void, as was also the contract of sale, and the plaintiff could not recover.

Tracy v. Talmage,¹ twice considered in the Court of Appeals of New York, and fully reported, embodied the learning and the doctrine of contracts of sale of property used for illegal purposes, and has since been recognized as a leading case in our country. On the motion for reargument, Mr. Justice Comstock said: "There is certainly room for distinction, between a case where the seller or lender simply knows of the illegal design, and one where he advances the money or the goods for the express purpose of enabling the other party to effectuate such design." He continues: "The principle should perhaps be stated, with some qualifications not suggested in the former opinion of the court. The case may be put of poison or a deadly weapon purchased for the purpose of murder. The offense intended may be of such enormity, that no man having a knowledge of the design can remain neutral, without being, in a just sense, a criminal himself. Where the design is to violate the fundamental laws of society, a positive duty of intervention may arise, to prevent the perpetration of a crime."

Sunday laws may avoid any contract made and completed on that day.² If part performance, or a new promise, is on another day, the price may be recovered. Usury laws not infrequently prohibit a recovery of the principal as well as the interest. Contracts for or in aid of smuggling fall under these rules, and are void; and contracts for distribution of prize proceeds in fraud of laws existing at the time,

¹ *Tracy v. Talmage*, 14 N. Y. 162, at p. 214; see *Hayes v. Hyde Park*, 153 Mass. 514.

² *Story Sales*, 501, 502, and notes; *Cortsey v. Territory New Mexico*, Sup. Ct. Aug. 24, 1892, 82 Pac. R. 504; 1 id. 201; *Com. v. McNeese*, 156 Mass. 231; *Story Conf. L.*, §§ 246, 249.

though since repealed, or the war at an end, must fail.¹ In *Wetherell v. Jones*, Lord Tenterden said: "When a contract, which a plaintiff seeks to enforce, is expressly, or by implication, forbidden by the statute, or common law, no court will lend its assistance to give it effect." Contracts in aid of the public enemy, to cover enemy's property, to carry on slave trading, for contraband of war, or in violation of treaty obligations, and forbidden by the government, cannot stand. Judge Story gives the example of contracts made in a foreign country, to procure loans in our own country, in order to assist the subjects of a foreign State in the prosecution of war against a nation with which we are at peace, for such conduct is inconsistent with just and impartial neutrality. The arbitration and award in the Alabama Claims proceeded on such principles.

In *Oscanyan v. Arms Company*, the Supreme Court of the United States held, that where it was shown by the opening statement of counsel for the plaintiff, that the contract on which the suit is brought is void, as being either in violation of law or against public policy, the court may direct the jury to find a verdict for the defendant. A consul-general of a foreign government, residing in this country, entered into a contract whereby, in consideration of a stipulated percentage, he agreed to use his influence in favor of a manufacturing company here, with the agent of that government sent to examine and report in regard to the purchase of arms by it. By exerting his influence, sales of arms were made by the company to that government, and he brought suit to recover the percentage. Held, that in a court of the United States there can be no recovery on the contract. In *Lee v. Johnson*, the same court held that when it clearly appears in a proceeding that a claim set up is against public policy, and that in no event could it be sustained, the tribunal should dismiss it whether the allegations of the party have or have not raised the question."

That contracts against public policy are void is unquestioned, but as Messrs. Story and Benjamin, and other writers of eminence and judges of great authority, have said, it is difficult to exactly define what constitutes public policy. This rule may be safely laid down, that what-

¹ *Armstrong v. Toler*, 11 Wh. 258; *Springfield Bank v. Merrick*, 14 Mass. 323; *Weymell v. Reed*, 5 T. R. 599; *Wetherell v. Jones*, 3 Barn. & A. 225; *Pellicat v. Angell*, 2 Crompt., M. & R. 811; 1 Kent Com. 67, 68; *Oscanyan v. Arms Company*, 108 U. S. 261; *Lee v. Johnson*, 116 U. S. 49. Contracts to violate the laws of another State cannot be enforced. *Graves v. Johnson*, 156 Mass. 211; *Pollock Con.* (5th ed.), 1308; *Bancher v. Maine*, 47 Me. 58; see *Hayes v. Hyde Park*, 153 Mass. 514; *Fisher v. Lord*, 63 N. H. 514; *Weymell v. Reed*, 5 T. R. 599; *Com. v. Zelt*, 138 Pa. St. 615; *Gaylord v. Soragen*, 82 Vt. 110.

ever contravenes an actual rule of policy, or which interferes injuriously with the true interests of society, is against public policy.¹ To it may be added the further statement, in Mr. Story's words,² "A contract in violation of the common law may be void either because it is immoral, or because it is against public policy." The same principles are appealed to, and the same results reached; the reasoning, also, is similar in cases arising under the express terms or prohibitions of police laws, or under the more elastic term of public policy, whether it be exhibited in the language of statutes, or treaties, by the common law, or is declared in the judgments of courts. Public policy rests on the same basis with police laws; and the police power, exercised necessarily for the public welfare, sustains them alike. It is under this phrase that we find most of the cases grouped, which have been held illegal. Contracts *contra bonos mores* are void. "The maxim applicable to such cases is "*ex turpi contractu non oritur actio*," which is an expression of public policy, and needs for its enforcement no express statute.³

A bookseller cannot recover the price of books, or prints, or caricatures of a grossly libellous, immoral or obscene character, although they be sent in answer to an order therefor. So, also, it is a good defense to an action for not supplying manuscript to complete a work, the copyright of which has been sold, according to agreement, that the matter of the work is unlawful and immoral. On the other hand, if a printer, after he has printed part of the work, discover that it contains libellous matter, and, in consequence, refuses to complete the printing of the work, he may nevertheless recover for so much as he has done." Judge Story observes that "it may be well to take notice of a distinction often but not universally acted upon in courts of equity as to the nature and extent of the relief granted or refused to parties to transactions against public policy." There are cases where the agreement "being against public policy, the circumstance that the relief is asked for by a party who is *particeps criminis* is not, in equity, material.

¹ Story Sales, § 489; Benj. Sales, § 517; see opinion Jessel, M. R., *Printing & N. Co. v. Sampson*, 19 Eq. 465; *Graves v. Johnson*, 156 Mass. 211. An agreement to avoid competition for the public printing was declared void. *Brooks v. Cooper*, 26 Atl. R. 978. "An agreement, the real nature and purpose of which is to suppress competition in an article of food and so tends to enhance the price, is contrary to public policy and void." *Judd v. Harrington*, 189 N. Y. 105.

² Story Sales, § 488; 1 Story Eq. Jur., §§ 298, 299, 301. In cases of *promissu pudicitia* there is a distinction between actions restraining the use of security given and actions seeking a restoration of property.

The reason is that public interest requires that relief should be given ; and it is given to the public through the party, and in these cases relief will be granted not only by setting aside the agreement, but also, in many cases, by ordering a repayment of any money paid under it." Lord Mansfield said there are "laws calculated for the protection of the subject against oppression, extortion, deceit, etc. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff should recover." Lord Thurlow thought that where money had been paid for an illegal purpose, the parties should be put back to the state where they were before, if courts of justice meant to prevent the perpetration of crimes.

Where both parties are truly *in pari delicto* relief is not granted, unless where public policy would thereby be promoted, but the courts have hesitated to enforce the rule against illegal contracts when they involved neither moral turpitude nor violated any general principle of public policy, and money or property had been advanced upon them. This has been seen in usury cases, and where in cases of corporations the doctrine of *ultra vires* has been invoked. It has even been held that if a note given for a loan was void, the loan and its security was valid and might be enforced ; and in *Railway Company v. McCarthy* it is said that "the doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong." Doubtless however we must return to the proposition cited in *Bank of Salina* case, from the opinion in *Thomson v. Thomson*, where the agreement was relied upon, and, if allowed, the plaintiff would reap the fruits of a violation of law, and it was said that where "the plaintiff cannot stir a step but through that illegal agreement, it is impossible for the court to enforce it." This is the rule in *Miller v. Ammon*, that "when a plaintiff cannot establish his cause of action without relying upon an illegal contract he cannot recover. It is immaterial that the statute does not declare a contract made in violation of it void. The law adjudges it so," the court says,

¹ *Smith v. Bromley*, Doug. 695, note; *Rider v. Kidder*, 10 Ves. 366; *Neville v. Wilkinson*, 1 Bro. Ch. 547; 18 Vesey, 382; *Duvall v. Wellman*, 124 N. Y. 156; *Bank of Salina v. Alvord*, 81 N. Y. 476; *City of Buffalo v. Balcom*, 134 N. Y. 532; *Pratt v. Short*, 79 N. Y. 487; *Duncomb v. N. Y., H. & N. R. R.*, 84 N. Y. 201; *Robinson v. Bland*, 2 Burr. 1077.

² *Railway Co. v. McCarthy*, 96 U. S. 268; *Rider Life Ins. Co. v. Roach*, 97 N. Y. 878; *Thomson v. Thomson*, 7 Vesey, 473; *Miller v. Ammon*, 145 U. S. 421; *Duval v. Wellman*, 124 N. Y. 156; *Crocker v. Whitney*, 71 N. Y. 173; see 79 N. Y. 445; *Robinson v. Bland*, 2 Burr. 1077.

in *Crocker v. Whitney*, and in *Pratt v. Snort* the condition is stated that to entertain any action upon a transaction of which the prohibited act is a part, it must be "without sanctioning the illegality."

The Court of Appeals of New York, in *Duval v. Wellman*, held that "although a court of equity will not, as a general rule, lend its aid to either of the parties to an illegal contract, by enforcing its execution or rescinding it, when the parties are not equally guilty, and when the public interest is advanced by allowing the more excusable of the two to sue for relief, the courts will take cognizance of an action for that purpose, and will grant relief by setting aside the contract and restoring the injured party to the original position. To establish a defense in such an action, it is not sufficient for defendant to show merely that the plaintiff is *particeps criminis*, but it must appear that the parties were *in pari delicto*, unless the contract be *malum in se*. In an action to recover back money paid by plaintiff to defendant, who carried on a business known as "a matrimonial bureau," on an agreement by him to procure a husband for her; he to return the money paid on a day named, if at that time she was willing to give up all acquaintance with gentlemen introduced to her by defendant, there was no evidence of actual over-persuasion or undue influence. The court held as a legal conclusion that the contract was illegal and that the parties to it were equal in guilt, and directed a verdict for defendant. Held, error; that while the contract was illegal, at most the inferences to be drawn from the facts as to the equality of guilt were for the jury. It seems that the business of promoting marriages is against the policy of the law and public interest, and the courts will aid a party who has patronized such a business by relieving him or her from all contracts made, and will grant restitution of any money paid or property transferred. It seems, also, that contracts by one party to procure, for a consideration, a husband or wife for the other are considered as fraudulent in their character, and the party paying the consideration will be regarded as under a species of undue influence."

"For the sake of the public, the bargain is rescinded" in many cases as instanced in *Chesterfield v. Janssen*. Contracts to procure the passage of a law by sinister means; or to obtain signatures for the pardon of a criminal; or to abandon the prosecution of the petition against the return of a member of the House of Commons; or for an interest in a contract prohibited to a member of the council; or in violation of public trust or confidence, as for suppression or disclosure of testimony; or to pay public officers for their personal benefit for acts

done in their official capacity; or assignments of the half pay of a retired officer, which operates as a fraud upon the public bounty; or an assignment of the fees and profits of office; contracts with an attorney to defend cases if such are brought for future violations of law; and where there is a prohibition of champerty and maintenance, contracts which have a tendency to encourage champerty; all these are void as against public policy.¹ And for the same reason courts of justice have frowned upon *post obit* bonds, iniquitous loans, contracts made by sailors for disposition of their prize money, contracts made in circumstances of pecuniary distress, where undue sacrifices are made, and for insufficient consideration, and all contracts which, in the language of Mr. Ray, in his book on limitations of contracts, invade any one of the interests cherished by the law, although not indictable and not prohibited by statute. It was said that even after the repeal of the statutes against usury in England, the doctrine by which the Court of Chancery afforded relief against improvident and extravagant bargains was not altered.

Public policy repudiates contracts of such description, because of their evil effects and mischiefs to the public. It finds, on the contrary, a good consideration for a gift proposed to secure good manners and morals. In *Hamer v. Sidway*,² defendant's testator agreed with his nephew, plaintiff's assignor, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become twenty-one years of age, he would pay him \$5,000. The agreement was kept on the nephew's part, who, soon after coming of age, wrote to the uncle, stating the sum was due and asking payment, and received an answer admitting the agreement, and saying that the testator had the money in bank set apart, which he proposed to hold for his nephew until he was capable of taking care of it. It was thereupon agreed that the money should remain on interest. The agreement was held valid and enforceable. It was said of loans affected by the Macedonian decree, which were made while the son was under paternal authority, and were not allowed to be valid, even after the death of the father, that it was not so much out of favor to the son as out of odium to the creditor, who had made an unlawful loan, vicious in its origin and in its example.

¹ 1 Atk. 301; *Boynton v. Hubbard*, 7 Mass. 119; *Bispham Pr. Eq.*, § 229; 1 Story Eq. Jur., §§ 298-299, 337, 348; *Ray Contractual Limitations*, 2, 5, 9; *Bowman v. Phillips*, 41 Kans. 364; *Buford v. Louisville & N. R. R. Co.*, 82 Ky. 236; *Chesterfield v. Janssen*, 2 Ves. 158; *Bispham Pr. Eq.*, §§ 221, 224.

² *Hamer v. Sidway*, 124 N. Y. 538.

These are the considerations affecting another class of cases, the last which we shall mention in this connection, respecting contracts for the procurement or sale of public offices. Such are held illegal in their subject-matter, and utterly void as contrary to the soundest public policy.¹ Lord Coke, in his commentary, notes in the instances he mentions, "that all promises, bonds and assurances, as well on the part of the bargainor as of the bargainee, are void by the same act. *Nam alia re magis Romana respublica interit, quam quod magistratus officia venalia erant,*" and stating the law of England, that "no officer or minister of the king shall be ordained or made for any gift or brokerage or affection; nor that any which pursueth by him, or any other privily or openly to be in any manner of office, shall be put in the same office or any other," says, "A law worthy to be written in letters of gold, but more worthy to be put in execution." He concludes with the rule, "Such condition as is intended by the law to be annexed to any thing is as strong as if the condition were in writing."

¹ Story Eq. Jur., § 841; 1 Dig. L. 14, t. 6, 1, 1; see, however, note 1 Story Eq. Jur. (8th ed.) p. 828 and note 8, p. 829; Co. Litt. 284a; 1 Story Eq. Jur., § 229; Atl. R. 300; 7 Mass. 119.

CHAPTER XIV.

PUBLIC POLICY AND ITS OBLIGATIONS IN MATTERS OF CONTRACTS,
COMBINATIONS AND STRIKES.

No exact definition of public policy will be found. Whatever is detrimental to the interests of the public, as understood at the time, falls within its ban. It is sufficient that this tendency be shown, and we have not to wait for the appearance of detrimental results. Positive law, or the express terms of a statute, are not necessary to its declaration. The welfare and security of civil society, for which government is constituted and laws are made, are the common foundation of public policy and statute law, and necessity guides them both.¹ "The government of the Confederacy had no existence except as organized treason," says the United States Supreme Court in *Spott v. United States*, "but the acts of the States in rebellion, in the ordinary course of administration of law, must be upheld in the interest of civil society, to which such a government was a necessity." If recusant to its duty, the disorders which government should prevent are present, and peace and liberty of action and rights of property may be invaded under the guise of authority from unlawfully constituted bodies which the law cannot recognize, or by an irregular strife for the benefit of individuals working a public injury.

It is superfluous to multiply examples. The Buffalo strike against railroads, the Homestead riots against iron industry, and the Tennessee outbreak of miners within one year, when half the militia force of each of these States was brought into the field to restore peace within its own fold, show what fearful consequences flow immediately from a disregard of experience from precedents, and a neglect of principles vindicated in the history of English and American law. "A conspiracy of any kind is illegal, though the matter about which they

¹ *Spott v. U. S.*, 20 Wall. 459; *Walker's Ex'rs v. U. S.*, 106 U. S. 413; *Lamar v. Micou*, 112 U. S. 476; *Austin v. Searing*, 16 N. Y. 112; *Leroy v. Hill*, 3 H. & N. 702; *Mitchell v. Reynolds*, 1 P. Wms. 181; 1 *Smith's L. Cases and note*, 508; *The People v. Fisher*, 14 Wend. 10.

conspired might have been lawful for them to do without a conspiracy," is the rule from modern reports. Upon the rule found that a conspiracy to raise wages is an act injurious to trade and commerce, the King v. Journeymen Tailors of Cambridge, and The Tubwomen v. The Brewers of London, are quoted from, in People v. Fisher, with the statement that the latter case has been cited by all subsequent writers on criminal law.¹ These are again used as authority for important recent decisions. In People v. Trequier and others, the defendants, journeymen hatters, were indicted and convicted, who, being persons of evil minds and dispositions, did conspire and combine, confederate and agree together to prevent and hinder one Daniel Acker from being employed in his business as a hatter, and to cause him, the said Daniel Acker, to be discharged from his employment as a hatter. This trouble was because Acker had not agreed to certain rules and regulations framed by other hatters, and was accused of working for "*knocked down wages*," which he denied.

These cases seem to hold that journeymen may simply refuse to work unless they receive an advance of wages; but if they do so by preconcert or association, they may be punished for a conspiracy.

A combination and agreement between the East India Company's officers to resign was declared unlawful, and the parties might be indicted for conspiracy. If several go to a theatre by previous agreement to hiss an actor, or cry down a play, they are guilty of a conspiracy. So, also, a combination to raise the price of funds by false rumors is indictable. In conspiracy under the common law the crime may be complete by the unlawful agreement. It is not necessary by the common law that any act be done in pursuit of it, and it may be inferred from the circumstances of the case. As was said in the Early case: "It was not for the denial to work they were indicted, but a conspiracy of any kind is illegal." The same opinion adds: "Among these we find precedents at common law against journeymen for conspiring to raise their wages and lessen the time of labor, and to compel masters to pay a whole

¹ King v. Journeymen Tailors, 8 Mod. 11; Tubwomen v. London Brewers, 8 Mod. 11, note to 1 Wheeler's Cr. Cases, p. 149; Ibidem, People v. Trequier, The Cr. Rec., p. 142, January, 1828; see 5 T. R. 636; Rex v. Bykerdyke, 1 M. & Rob. 179; 1 Wh. Cr. Cases, 151; 4 Burr. 2472; 2 Campbell, 358; 3 M. & S. 67; 1 Salk. 174; 1 Stra. 144; 3 Chitty Cr. L., note 9. In England it was not necessary to allege or prove any overt act in pursuance of the conspiracy. O'Connell v. Regina, 11 Cl. & Fin. 155. The rule of the common law was changed in New York. An overt act is required in New York to complete the offense. 2 R. S. 692, § 10; Penal Code, § 171; People v. Sheldon, 54 N. Y. St. R. 518; see note 2, Chap. IX. "An agreement to engage in a prize fight is a conspiracy to commit a crime." Seville v. State, 49 Ohio, 117.

day's work; against journeymen lamp-lighters, for conspiring to raise wages, and for journeymen carriers for the like offense; against salt makers, for conspiring to enhance the price of salt; against journeymen serge-weavers, for refusing to work for a master who had employed a man contrary to certain rules entered into by conspiracy; against journeymen leather dressers, for conspiring to induce a man to turn a person out of his employment; against master rope-makers, for conspiring not to employ journeymen who had left their last master without his consent. Some of these offenses seem to have had for their object the oppression and injury of an individual; others were calculated to injure the public. The immediate object in those cases, as in this, probably was to benefit the conspirators themselves; but if their individual benefit is to work a public injury, a conspiracy for such an object is against the spirit of the common law."

Many important considerations, brought to view by the circumstances of a recent case, are stated in the opinion of the United States Supreme Court.¹ It says: "Ordinarily the law leaves to parties the right to make such contracts as they please, demanding, however, that they shall not require either party to do an illegal thing, and that they shall not be against public policy, or in restraint of trade." There are certain fundamental rights which no man can barter away, and which government cannot deny to him; "a contract not to set up any defense whatever to any suit that may be begun upon fifty different causes of action, is in violation of public policy. Some private rights, such as defenses under usury laws, or statutes of limitation, or to contracts having for their objects the perversions of the ordinary operations of the government, or the rights to life and personal freedom, are founded in public policy, which is promoted when the defense is made to adverse claims, and is contravened by the refusal to make such defense." Again, the action of courts is to decree a specific performance of agreements, and at times a mandatory injunction issues to prevent a refusal to perform a covenant, or stipulated duty, while on other occasions all interference is refused, because the parties are in equal fault, neither

¹ The Pope Mfg. Co. v. R. Phillip Gormully, 144 U. S. 224-254; Knowlton v. Congress and Empire Sp. Co., 57 N. Y. 518; Colles v. Troy City D. Co., 11 Hun, 397; Lives v. Nicholls, 2 C. D. 501; Hayes v. Rudd, 83 N. Y. 251; Leonard v. Poole, 114 N. Y. 371; Harvay v. Merrill, 150 Mass. 1; Hobbs v. Cons. Gas Co. of Balt., 130 U. S. 896; The St. Louis, V. C. T. H. R. R. Co. v. T. H. & I. R. R. Co., 145 U. S. 393; Rogers v. Maddock, Eng. Ct. App., 67 L. T. R. (N. S.) 829; Mills v. Dunham, 64 L. T. R. (N. S.) 712; Judd v. Harrington, 139 N. Y. 105.

can ask for aid, and the court will not enter upon their differences. The public interest often is paramount.

This appears in the exaction of full performance of conditions beneficial to the public, or in the refusal to enforce provisions of injurious effect.¹ In *Gibbs v. Consolidated Gas Company of Baltimore* the court said, "A corporation cannot disable itself by contract from performing the public duties which it has undertaken, nor by agreement compel itself to make public accommodations subservient to its private interests." This was the rule governing the case of *Arnot v. Pittston and Elmira Coal Company* where the contract was to keep out of the market a supply of coal. In *Oliver v. Gilmore*, where the public interest was merely in the restriction of trade, through a contract, binding the party not to use his plant for the production of strap and T hinges for five years, the contract was held void as against public policy. In *Atcheson v. Mallon*, where a contract for public work was to be awarded to the bidder thereon who offered the most favorable terms, any agreement between parties to restrain, or lessen rivalry or competition between them, was declared to be void, although no detrimental result was shown. Separate sealed proposals were filed, but two of the parties agreed to share the profits and the losses, if the contract was awarded to either of them, and this agreement was held contrary to public policy and void.

Mills v. Mills in the State of New York was of this public character. The consideration of the contract in suit was that one of the parties would give "all the aid in his power, spend such reasonable time as was necessary, and generally use his influence and exertions to procure the passage into a law" of a bill introduced in the legislature. "Such contracts," the court said, "tend to subject the legislature to secret improper and corrupt influences, and will not be enforced. A like disposition was made, in an action on an agreement entered into in the State to gamble in the legalized lotteries of another State.

The enforcement of contracts with water companies was before the Supreme Court of Kansas in March, 1893. The company contended, that inasmuch as payment was required only from the city, for the use

¹ *Gibbs v. Cons. Gas Co. of Balt.*, 130 U. S. 396; *Arnot v. P. & E. Coal Co.*, 68 N. Y. 558; *Oliver v. Gilmore*, 52 Fed. R. 562; *Atcheson v. Mallon*, 43 N. Y. 147; *Mills v. Mills*, 40 N. Y. 543; *Goodrich v. Houghton*, 134 N. Y. 115. *McLanahan v. Mott*, N. Y. Sup. Ct., Gen. T., 1st Dept., Nov. 17, 1893, 25 N. Y. Supp. 892, holds that a sale of the N. R. Bridge Company bonds on the plan proposed is a lottery scheme and to be restrained. See chap. IX, p. 175. *Greenfield v. Gilman*, 140 N. Y. 168.

of hydrants for extinguishment of fires and other public purposes, the city could only complain in case of a failure to supply water sufficient in quantity for the public purposes of the city. The city of Winfield entered into a contract with the Winfield Water Company for the construction of a system of water-works, and to supply the city and its citizens with well-settled and wholesome water. The city contracted for certain rates for the use of hydrants for the extinguishment of fire, flushing gutters, etc. The company agreed to furnish water free to the city at certain public places, and to furnish it to the citizens of the city at certain rates. Held, that "it is not only the right of the city authorities, under the contract between said parties, but it is their duty to enforce the terms of the contract as to the quality of the water supplied; not only to the city for public purposes, but also to private citizens for private uses."¹ There can be no matter of higher public concern to every city than the supply of pure and wholesome water for all useful purposes, and as population becomes more and more compact, and cities grow, the ability of the individual member of the municipal corporation to supply his individual wants in that direction constantly diminishes, and in all the larger places it becomes a matter of absolute public necessity that the city itself should, directly or indirectly, provide the supply."

"The preservation of favorable sanitary conditions is one of the very highest duties devolving on city authorities, and nothing else so directly and materially affects the health of the community as the character of its water supply. We think the ordinance which became a contract between the parties shows clearly that these considerations were in the minds of the parties to the contract at the time it was made. Section 17 contains an agreement, on the part of the water company, to keep said works always in operation, and supply in ample quantity the city and inhabitants thereof, with well-settled and wholesome water. This section also provides for furnishing the city offices, schools, and public drinking and watering fountains, free. These supplies are clearly public; they are supplies to public offices, public schools, and in public places for the use of the public generally; and, while the rates mentioned are free, it cannot be said, when all the provisions of the contract are construed together, that the water furnished the public at these places is, in any sense, a donation or free gift by the water com-

¹Winfield v. Winfield Water Co., 82 Pac. R. 668; Mott v. Manufacturing Co., 48 Kans. 12; N. Y. L. J., April 28, 1893.

pany to the city or to the public. It cannot be contended for a moment, that the water company intended to furnish water at these places "free," irrespective of the obligation of the city to use the hydrants it contracted for, and to pay the rental provided for in the ordinance. Free water at these public places was unquestionably one of the inducements and considerations which led the city to pass the ordinance, and enter into the contract with the defendant. It may be conceded that dirty, foul water will extinguish fires and flush gutters as well as pure and wholesome water, yet this contract provides for nothing but a supply of well-settled wholesome water, even for the purposes for which it should be used for the city itself. We think that, even if it could be said that this contract is divisible, and that the city can only enforce the provisions of it so far as it relates to the supply furnished the city itself, still the city has a right to insist on that quality of water which the contract calls for. But when we consider that the water consumed by the city through its fire hydrants, and the water consumed by the citizens for private uses, must of necessity flow through the same mains, be derived from the same source, be of the same quality and character, it seems to us absurd to say that the provisions made by the city authorities for the benefit of the inhabitants of the city generally, and assented to by the water company, may not be enforced by the city in behalf of the people, but may be violated by the water company at will, and that they may furnish to the city, for public purposes, water of any quality that will subserve those purposes, even though their contract requires them to furnish that which is pure and wholesome. We not only think that the city may enforce the provisions of the contract in favor of its citizens, but we think it clearly the duty of the city to do so. We think that not only the right exists in, but the duty rests upon, the corporate authorities of every city to see that the supply of water furnished its citizens, whether through public water-works, or, as in this case, works constructed by a private corporation, under a contract with the city, should at all times be wholesome and free from every thing that would endanger the lives or the health of the people. We conclude, therefore, so far as this branch of the controversy is affected, that this contract is entire, and that the city may and should see that all its provisions are substantially complied with."

In *Leonard v. Poole*, there was a combination to advance the price of lard, and redress was sought for frauds perpetrated by one of the parties upon his principals, in carrying out this unlawful enterprise, but its character furnished a sufficient defense. *Follett, C. J.*, said in

this case: "Courts are not organized to enforce the saying that there is honor among law breakers, and the desire to punish must not lead to a decision establishing the doctrine that law breakers are entitled to the aid of courts to adjust differences arising out of and requiring an investigation of their illegal transactions." This was the substance of a recent decision in the New York Supreme Court, where an injunction was asked by the members of the Clothing Manufacturers Association to retain the issue of a circular by the cutters, and it was held by Mr. Justice Barrett that the plaintiffs had not come into court with clean hands, but had resorted to measures of aggression which disqualified them from asking for equitable relief. If, however, the matter be of immediate public concern, minor differences or inequalities are passed over in order that their confusion may not prejudice the greater public interest.

In *Union Pacific Railroad Company v. Hall*, a mandamus was granted on the motion of private citizens to compel the use of the bridge over the Missonri river between Omaha in Nebraska and Council Bluffs in Iowa as a part of one connected and continuous line of railroad and bridge, and *The King v. The Severn and Wye Railroad* was cited, where a writ was awarded on the application of a private individual without allegation of special injury to himself, commanding the railroad to lay down again a railway they had taken up.¹ Mr. Justice Strong observes, "There is, we think, a decided preponderance of American authority in favor of the doctrine that private persons may move for mandamus to enforce a public duty, not due to the government as such, without the intervention of the government law officer. The Attorney-General prayed for a writ in *People v. Rome, Watertown and Ogdensburg Railroad Company*, but was denied on the ground that that railroad accommodated all the travel, had not exceeded its franchise, and that there was no public duty to enforce.

¹ *Union Pac. R. R. v. Hall*, 91 U. S. 343, pp. 354, 355; *The King v. Severn & W. R. R.*, 3 Barn. & Ad. 646; *The People v. R. & O. R. R. Co.*, 108 N. Y. 95; *The Troy & B. R. R. v. The Boston, H. T. & W. R. R.*, 86 N. Y. 107; at page 124, Mr. Justice Danforth seems to intimate a doubt as to the remedy, but he joins in the decision in 108 N. Y. 95, in which, see Judge Earl's citations at page 108; *The People v. The Alb. & V. R. R.*, 24 N. Y. 261. See an interesting article in 8 *Polit. Q. Rev.* March, 1893, by F. J. Goodwin "interest in mandamus cases," maintaining that "there is a preponderance of American authority for the doctrine that private persons may move for mandamus to enforce a public duty." This is the rule in *Un. Pac. R. R. v. Hall*, 91 U. S. 343; see *People v. Halsey*, 87 N. Y. 844; *Atty.-Gen. v. Boston*, 123 Mass. 460; *Pike v. State*, 11 Ill. 202; *State v. Common Council*, 83 N. J. L. 110; *Hamilton v. State*, 3 Ind. 842.

In *People v. The Albany and Vermont Railroad Company*, it was held that a railroad company forfeits its franchise by abandoning or ceasing to operate a part of the route, and three of the judges concurred in the view that the duty to exercise the franchise granted to the corporation cannot be neglected, and a portion of the road abandoned, and a forfeiture incurred at its mere pleasure, but a remedy was by mandamus or indictment, or at the election of the State, a proceeding to annul the corporation. In *The Mayor v. The Dry Dock, East Broadway and Battery Railroad Company*, the question of an ordinance requiring street cars to be run within certain intervals during the night was before the court, but because of an error in the rejection of evidence the judgment was reversed. The court says, "Presumptively the ordinance was required in the interests of the public for whose convenience railroad companies hold and must operate their franchises."

Performance of contracts for carrying the mails may be insisted upon, and interference with trade or commerce by stopping trains or obstructing railroads and steam vessels may be punished.¹

The right to labor and the right to services are property rights, and whoever unlawfully interferes with them is liable for damages or, as in common law cases and *People v. Fisher*, cited above, may be held in a criminal action.² The New York Penal Code makes it a misdemeanor to prevent another from exercising a lawful trade or calling, or doing any lawful act, by force, threats, intimidation or by interfering, or threatening to interfere, with tools, implements or property belonging to or used by another, or with the use or employment thereof, or to commit any act injurious to trade or commerce. Under the United States laws no master, chief mate, pilot or engineer of a steam vessel can pursue his avocation without a license and certificate of competency from the Board of United States Inspectors of Steam Vessels of his district. He is then subject to the further regulation that if, to the hindrance of commerce, he wrongfully or unreasonably refuse to serve in his official capacity on any steamer, as authorized by the terms of

¹ *Mayor v. Dry Dock & E. B. R. R.*, 133 N. Y. 104, 111; *Central Trans. Co. v. Pullman Car Co.*, 139 U. S. 55; *Thomas v. R. R. Co.*, 101 U. S. 71; *People v. B. R. R. Co.*, 126 N. Y. 29.

² *Ann Arbor cases*, U. S. C. Ct., Toledo, O., 54 Fed. R. 780; *Georgia Cent. R. R. case*, U. S. C. Ct., Macon, Ga., April, 1898; U. S. R. S., § 4449; N. Y. Penal Code, § 168, subds. 5, 6.

³ *Lawyer v. Fritcher*, 130 N. Y. at p. 243; *People v. Fisher*, 14 Wend. 10; *People v. Trequier*, 1 Wheeler Cr. Cas. 142; 8 Mod. 11; 3 Chitty Cr. L. 1163; 6 Term R. 636. N. Y. Penal Code, § 168; U. S. R. S., § 4449.

his certificate or license, or shall fail to deliver to the applicant for such service at the time of such refusal, if the same shall be demanded, a statement in writing assigning good and sufficient reasons therefor, or if any pilot or engineer shall refuse to admit into the pilot-house or engine-room any person, whom the master or the owner of the vessel may desire to place there, for the purpose of learning the profession, his license shall be revoked upon the same proceedings as are provided in the cases of revocation of such licenses." He is also subject to further regulations made in the public interest and held to further responsibilities.

Although a private individual his private contract of service implies and embodies, as it were, a duty to the public, which the law has fixed as a condition, or one of the conditions of his occupation, as it has established the relations of other occupations coupling them with duties to the public. Common carriers, innkeepers, auctioneers, engineers having charge of steam apparatus and boilers in buildings, and others, hold in some respects similar relations of duty to the public. Engineers and other railroad employees are subject to examinations of their fitness and for color blindness in several of the States, and the courts, in sustaining these requirements, have also intimated that the United States government has authority, in its regulation of commerce, to enforce general rules in these particulars. It has never been doubted, says Mr. Justice Matthews in *Smith v. Alabama*, "that this entire body and system of law regulating in general the relative rights and duties of persons within the territorial jurisdiction of the States without regard to their pursuits, is subject to change at the will of the legislature of each State, except as that will may be restrained by the Constitution of the United States. It is to this law that persons within the scope of its operation look for the definition of their rights, and for the redress of wrongs committed upon them. It is to be remembered railroads are not natural highways of trade and commerce. The rules prescribed for their construction and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the limits of the local law."

In the *Nashville Railroad* case, Mr. Justice Field, delivering the opinion of the court, says: "It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties and liabilities of employees, and others on railway trains, engaged in that commerce;

and that such legislation will supersede any State action on the subject. But until such action is had it is clearly within the competency of the State to provide against accidents or harm while within its limits." And citing the question of the Smith case, this opinion at the same time conveys the answer "why may it (the State) not define and declare that particular things shall be done and observed by such a carrier in order to insure the safety of persons and things he carries, or of the persons and property of others liable to be affected by them. Clearly what the State may punish or afford redress for, when done, it may seek by proper precautions in advance to prevent." It is difficult, as the courts have everywhere said, to draw the line of public policy which insists upon measures necessary for public security, and prohibits that which is detrimental to public interests; and yet, as the same decisions inform us, these measures are not absolutely invariable, for, as was said in *Pope Manufacturing Company v. Gormully*, what in one stage of our civilization may seem to conflict with public interests at another may be held legal and binding. Hence it is said that rules should not be arbitrarily extended so as to interfere with the freedom of contract, yet in the instance of business of such a character as to be affected with a public interest, the law cannot regard as beyond its supervision any thing to overturn, or in evasion of what the law has established, or "detrimental to public order and the public good, in such manner and degree as the courts have defined."

The general rule is that all restraints of trade, which the law so much favors, if nothing more appear, are bad.¹ Trade and commerce have been held not synonymous. But the reasons for a distinction, so far as public interests are concerned, in any restraint of trade or interference with commerce, foreign or interstate, have practically disappeared in our country. The State courts give effect to the national laws, and in the United States there has been a tendency to revive with the aid of legislation the strict rules of the common law against all forms of monopoly or engrossing, while in England a contrary tendency has been noticed."² In *Mitchell v. Williams* it was

¹ *Gibbs v. Cons. Gas Co.*, 130 U. S. 896; *Printing Co. v. Sampson*, L. R., 19 Eq. 462; *New Orleans Gas L. Co. v. Louisville L. & H. Co.*, 115 U. S. 650; *id.* 688; *Smith v. Alabama*, 124 U. S. 465; *Nashville, C. & St. L. R. R. v. Alabama*, 128 U. S. 96; *Pope, etc., v. Gormully*, 144 U. S. 224.

² *Mitchell v. Reynolds*, 1 P. Wms. 181; 1 *Smith's L. Cases*, 641; *id.* 648; see 20 *Wall.* 64; 139 U. S. 79.

³ *People, ex rel. Penn. Co., v. Edward Wemple, Compt., etc.*, 188 N. Y. 1, where a tax is set aside as a regulation of interstate commerce; *Pickard v. Pullman Car Co.*,

held that "a bond or promise to restrain oneself from trading in a particular place, if made upon a reasonable consideration, is good. *Secus*, if it be on no reasonable consideration, or to restrain a man from trading at all." In many cases contracts in partial restraint of trade have been found divisible, and held to be void in part, but in some respects beneficial, and in these sustained.

The difficulty has been, says Mr. Justice Putman in *Oliver v. Gilmore*, to perceive "how the old strict rules can be applied judicially to the present conditions without laying down propositions which might in their application check enterprise or interfere with freedom of trade." He distinguishes four classes, in none of which can the contract in the case at bar be placed if viewed in accordance with established principles because "in lieu of having no tendency to destroy the usefulness of property, or to deprive the country of any industrial agency, or to require transfers of residence or allegiance, or the cessation or diminution of business, it is in all these respects directly the reverse." The question however to be regarded under the particular circumstances of such cases is whether the contract is or is not unreasonable. The law, said Best, C. J., in *Homer v. Ashford* will not permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed therefore by which a person binds himself not to employ his talents, his industry or his capital in any useful undertaking in the kingdom would be void. But it may often happen that individual interest and general convenience render engagements not to carry on trade, or to act in a profession, in a particular place proper. In *Bunn v. Guy* an attorney bound himself not to practice within London, and one hundred and fifty miles from thence. In *Davis v. Mason* the restraint upon a surgeon not to practice within ten miles of the plaintiff's residence was considered reasonable, while in *Horner v. Graves* a surgeon dentist's agreement to abstain from practising within one hundred miles of York was declared unreasonable. In *Mallan v. May* the defendant covenanted after the expiration of the term of instruction not to carry on the same business of dentist in London or in any of the towns or places in England and Scotland where the plaintiff or the defendant on

117 U. S. 24; *Oregon S. N. Co. v. Winsor*, 20 Wall. 64; *Central Trans. Co. v. Pullman P. Car Co.*, 189 U. S. 24; *Oliver v. Gilmore*, 52 Fed. R. 563; 47 Alb. L. J. 258; *Steamship Co. v. McGregor*, 21 Q. B. Div. 544; 23 id. 598.

their account might have been practising before the expiration of the license.'

It was said in this case "that contracts in partial restraint of trade are beneficial to the public as well as to the immediate parties, for if the law discouraged such agreements as these, employers would be extremely scrupulous as to engaging servants in a confidential capacity seeing that they would incur the risk of their taking advantage of the knowledge they acquired of their customers, and their mode of conducting business and then transferring their services to a rival trader." The contract was however held too large, but divisible, and the covenant relating to not practising in any of the towns or places in England or Scotland, outside of London, was held unreasonable and void.

This same divisibility of contracts was found by the United States Supreme Court in *Oregon Navigation Company v. Winsor*,² where a steamer was sold from California waters for the navigation of the Columbia river with a stipulation that it should not be employed for ten years in California. Three years afterward the same steamer was sold for navigation on Puget Sound, subject to a stipulation that she should not be run upon any of the routes of travel, or the rivers, bays or waters of the State of California, or the Columbia river and its tributaries, for the period of ten years. The contract was sustained in part and for the first term of ten years, but it was held void as to California waters for the additional three years added by the second contract, a period to which the original contractor was not bound. The prohibition in a contract in restraint of trade should not extend any further than will protect the party for whose benefit the contract is made in his occupation or business. Lord Justice Bowen in the *Nordenfelt* case says:

"Contracts unlimited in area, although they may be limited in time, are as a rule held bad on the ground of public policy," and reviews at some length the common-law doctrine of restrictions upon trade, com-

¹ 1 Smith's L. C. 516, 648, *seq.*; *Homer v. Ashford*, 8 Bing. 828; *Bunn v. Gay*, 4 East, 190; *Davis v. Mason*, 5 T. R. 118; *Horner v. Graves*, 7 Bing. 743; *Mallan v. May*, 11 M. & W. 653; *Rogers v. Maddock*, 67 L. T. R. (N. S.) 329, follows *Horner v. Graves*, and cites *Mills v. Dunham*, 64 L. T. R. (N. S.) 712; *Greenfield v. Gilman*, 140 N. Y. 168.

² *Oregon Nav. Co. v. Winsor*, 20 Wall. 64; *Fowle v. Park*, 131 U. S. 88; and see note with collection of cases on contracts against public policy in same case, L. Ed. Book, 33 U. S. 67-73. See opinion of Lord Justice Bowen in *Nordenfelt* case (*Law Times*, Aug. 26, 1898), 48 Alb. L. J. 258; *Rousillon v. Rousillon*, L. R., 14 Ch. Div. 351-369.

menting particularly upon *Mitchel v. Reynolds*, and the effect, upon the distinction established between general and partial restraints of trade, of *Rousillon v. Rousillon*, and the opinion of Lord Justice Fry, which he discusses. He says in conclusion: "The result seems to me to be as follows: General restraints, or, in other words, restraints wholly unlimited in area, are not, as a rule, permitted by the law, although the rule admits of exceptions. Partial restraints, or, in other words, restraints which involve only a limit of places at which, of persons with whom, or of modes in which the trade is to be carried on, are valid when made for a good consideration, and where they do not extend further than is necessary for the reasonable protection of the covenant. A limit in time does not by itself convert a general restraint into a partial one. That which the law does not allow is not to be tolerated because it is to last for a short time only." "Exceptions to rules which are not 'artificial,' but based on reason and public policy, ought themselves to be instances in which to apply the letter of the rule would be to violate its true meaning, and in which the very reason on which the rule is based militates in favor of the exception."

"One instance of an exception to the rule which discourages general restraints of trade is admitted to exist in respect of the assignment of trade secrets, and it may here be useful again to allude to the ground upon which such dispositions of property are excluded from the operation of the ordinary doctrine. In the case of the assignment of a trade secret there arises a conflict between two ideas, both of which are developments in opposite directions of the larger principle that English industry and trade ought to be left free. The first of the two seemingly antagonistic corollaries to which this larger principle leads is the maxim that no one should be allowed to contract himself out of his liberty to trade. The second, which appears to conflict with the first, is that every man should be at liberty to sell the good-will of his trade on any terms that are neither oppressive to himself nor injurious to the State. These two antinomies are well contrasted by James, V. C., in *Leather Cloth Company v. Lonsont*, *ubi supra*. The history, indeed, of the entire doctrine as to restraint in trade is itself nothing but a narrative of the continual efforts of the English law, amidst all the changing conditions of English industry and commerce, to adjust and harmonize these two opposite points of view."

"It has been in the process of such gradual adjustment that the more indulgent law as to partial restraint of trade has been evolved. The latter rule as to partial restraint is thus itself an exception, the defini-

tion of which again expanded from time to time as society required it. The law as to trade secrets, like the law of partial restraint, is an exception, too. Before the manufacturer or trader sells his trade secret he is the sole possessor of it. If he sell it to advantage, he must of necessity be able to undertake not to retain the right to use it or to communicate it to others. A covenant that he will not destroy the value of that which he himself is handing over, causes in such a case, no diminution in the supply of commodities to the world, but tends in nine cases out of ten, to stimulate it. There is no tendency, in such a transaction, to create a monopoly, for the monopoly existed *ex hypothesi* already. Trade cannot suffer by the substitution of one possessor of a secret for another."

Very wide limits have been given by the court to the territory, and again to the time, by which contracts may be held only in the partial restraint of trade and sustained.¹ Thus, in *Diamond Match Company v. Roeber*, it was said the early doctrine of the common law, that contracts in general restraint of trade are void without regard to circumstances, while it has not been fully abrogated, has been much weakened and modified. It does not depend on State lines, which are not the boundaries of trade and commerce. By the contract in suit, the defendant was not at any time to engage in the manufacture or sale of friction matches within any of the States or Territories except Nevada and Montana, and this was held binding. In *Whittaker v. Howe*, an agreement by a solicitor, for a valuable consideration, not to practice as a solicitor in any part of Great Britain for twenty years, was held valid. But in another case (*McNutt v. McEwen*), it was said that before a command not to practice medicine in the neighborhood could be enforced, evidence must show the extent of the practice sold. No presumption in favor of a contract in restraint of trade exists, and "where no consideration appears on the face of the instrument, although it is under seal, it has been held void if in restraint of trade.

¹ *Diamond Match Company v. Roeber*, 106 N. Y. 478; *Leslie v. Lorillard*, 110 N. Y. 519; *Tode v. Gross*, 127 N. Y. 490; *Taylor v. Blanchard*, 18 Allen, 870; *Hodge v. Sloan*, 107 N. Y. 244; *Washburn v. Dosch*, 68 Wis. 486; *Smith's Appeals*, 113 Pa. St. 579; *Rousillon v. Rousillon*, L. R., 14 Ch. Div. 351; *McNutt v. McEwen*, 10 Phila. 112; *Lawrence v. Kidder*, 10 Barb. 641; *Bingham v. Maigne*, 20 Jones & S. 90; *Whittaker v. Howe*, 8 Beav. 383; *Weller v. Hersee*, 10 Hun, 431; *Book 35*, U. S., note page 68; *id.*, p. 71; *Compers v. Rochester*, 56 Pa. St. 194; *Arnot v. Pittston & E. C. Co.*, 68 N. Y. 558; *Saratoga County Bank v. King*, 44 N. Y. 87; *Davies v. Racer*, 25 N. Y. Supp. 293.

Illegality of one provision will not necessarily make the entire contract void, whether the illegality be by statute or by the common law, but where the legal and illegal parts cannot be severed, the contract is altogether void. A separation of the good consideration from that which is illegal will be attempted in those cases only, where the party seeking to enforce the contract is not the wrong-doer, or the denial of relief would benefit the guilty party at the expense of the innocent; and it is an inflexible rule that no remedy can be had where both parties are *in pari delicto*, is said in *Saratoga County Bank v. King*. All agreements, however, to stifle fair competition in trade, are void.¹

A combination has been defined as a conspiracy in law whenever the act to be done has a necessary tendency to prejudice the public, or oppress individuals, by unjustly subjecting them to the power of confederates and giving effect to the purposes of the latter. No agreement for defrauding the public can be valid.² In *Hooker v. Vandewater* the proprietors of five several lines of boats engaged in the business of transporting persons and freight on the Erie and Oswego canals, entered into an agreement among themselves to run for the remainder of the season of navigation at certain rates for freight and passage then agreed upon, but which were to be changed whenever the parties thought expedient, and to divide the net earnings among themselves according to certain proportions fixed in the articles. This agreement was held to be a conspiracy to commit an act injurious to trade contrary to the Revised Statutes of New York, illegal and void. A like agreement in *Stanton v. Allen* was similarly disposed of, and the agreement was said to have the tendency "to increase prices, to

¹ *Atcheson v. Mallon*, 43 N. Y. 147; *Gibbs v. Smith*, 115 Mass. 592; *Marsh v. Chicago, R. I. & P. R. Co.*, 89 N. W. R. 648; *Hopkins v. Ensign*, 122 N. Y. 144; *People v. Stevens*, 71 N. Y. 527; 40 N. Y. 545; 44 N. Y. 87; 184 N. Y. 115, 269; *Anderson v. Jett*, 89 Ky. 375.

² *People v. N. R. S. R. Co.*, 121 N. Y. 582; *Thompson v. Davis*, 13 Johns. 112; *Hooker v. Vandewater*, 4 Denio, 849; see 66 N. Y. 293; *Stanton v. Allen*, 5 Denio, 435; *Gale v. Kalamazoo*, 23 Mich. 344; *Bestor v. Watkins*, 60 Ill. 188; *York v. Merritt*, 77 N. C. 213; *Wight v. Rindskopf*, 43 Wis. 344; *Bowman v. Phillips*, 8 L. R. A. 631; *Bell v. Leggett*, 7 N. Y. 176. The rule applies to corporations. "It is a mere fiction that a corporation is an entity apart from the persons who compose it," and acts done by the stockholders to control the corporate agencies *ultra vires* of the corporation and against public policy, may be challenged in *quo warranto* and the statute of limitations for forfeiture of charter does not prevail for the exercise of a power unauthorized under the laws of the State. "Judgment ousting the defendant from the right to make the agreement set forth in the petition and of the power to perform the same." *State ex rel. v. Standard Oil Co.*, 49 Ohio, 187.

prevent wholesome competition, and to diminish the public revenue and therefore was void by principles of common law."

In *Leslie v. Lorillard*, however, it was said, "No contracts are void as being in general restraint of trade when they operate simply to prevent a party from engaging or competing in the same business," thus showing somewhat of the gradual change in doctrine respecting restraints of trade. In *Gale v. Kalamazoo*, a market-house was built and placed under the care of the president and trustees of the village, by one Gale, who was to have the rents and to keep the place in good condition. The court says such contracts tend to divest the corporation of its legislative authority and create a monopoly in favor of the contractor. Legislative discretion of municipal authorities cannot be bargained away. In *Bestor v. Watken* the only consideration for a contract to convey to railroad officers and employees an interest in land in the town of El Paso, was their agreement to aid, and to contribute, to the building up of a town on the defendant's land, and it was held the contract could not be enforced. In *Wight v. Rindskopf*, and *Bowman v. Phillips*, contracts with lawyers in advance for professional services were held under the circumstances contrary to public morality and policy. The attorneys could not recover for services actually performed under one of these agreements, which was to defend all cases brought against the other contracting parties in violation of the liquor laws.

In *Harrington v. The Victoria Graving Company*, the plaintiff was not allowed his commissions in a contract for services in superintending repairs of certain ships, because, in part consideration, the plaintiff had promised to use his influence with the railroad, of which he was an engineer, occupying a position of trust, to procure acceptance of defendant's tender for such work.¹ The jury found that plaintiff had not rendered less beneficial service to his company than he would otherwise have done, but the court held, that even if the plaintiff had not been induced to act corruptly, the consideration of the contract was corrupt, and the action could not be maintained. In *Bell v. Leggett*, Mr. Justice Jewett sums up the prevailing rules, and says: "Whenever a contract is entered into with a view to contravene any

¹ *Leslie v. Lorillard*, 110 N. Y. 519, 533; *Tode v. Gross*, 127 N. Y. 490; *National P. Bank of England v. Marshall*, 40 L. R. 112; *Central Shade Roller v. Charles H. Cushman*, 148 Mass. 358; *Brooks v. Cooper*, 26 Atl. R. 978.

² *Harrington v. Victoria G. Co.*, 28 Moak Eng. R. 453; *Bell v. Leggett*, 7 N. Y. 173, 179; *Trist v. Child*, 21 Wall, 441.

of these general principles, there is no form of words, however artfully introduced or omitted, which can prevent courts of law and equity from investigating the truth of the transaction, for *ex turpi contractu actio non oritur* is a rule both in law and equity." In that case a note given by a third person to a creditor, in consideration of his withdrawing opposition to the discharge of his debtor as a bankrupt, although without the knowledge or connivance of the debtor, was held void as against the policy of the law.

In respect to the obligations of public policy, corporations hold different places from individuals before the law, but even the private citizen may find the use of his property controlled for the public welfare as we have already seen, or a use "which violates the duty the owner owes to his neighbor or the State" may be prohibited.¹ The Court of Appeals of New York, in *People v. North River Sugar Refining Company*, has given a new explanation of the distinction drawn by the courts, between the responsibilities of natural and artificial persons, particularly with regard to combinations in restraint of trade, as follows: "The individuals are few who hold in possession such enormous wealth, and fewer still who peril it all in a manufacturing enterprise; but if corporations can combine and mass their forces in a valid trust or partnership, with little added risk to the capital already embarked, without limit of the magnitude of the aggregation, a tempting and easy road is opened to enormous combinations, vastly exceeding in number and strength and in their power over industry, any possibilities of individual ownership; and the State, by the creation of the artificial persons constituting the elements of the combination, and failing to limit and restrain their powers, becomes itself the responsible creator, the voluntary cause of an aggregation of capital, which it simply endures in the individual, as the product of his free agency; what it may bear is one thing, what it should cause and create is quite another."

The same court in *Leslie v. Lorillard* says, "the object of government as interpreted by the judges is not to interfere with the free right of man to dispose of his property or of his labor, but to guard society of which he is a member from the injurious consequences of his agreements; whether they arise from his own improvidence in bargaining

¹ In *Prentice v. Weston*, 111 N. Y. 460. By chap. 215, N. Y. L. 1885, it ceased to be lawful for an owner to peel bark or cut timber on his land when taxed upon it, were returned impaired. *Matter of McGraw*, 111 N. Y. 66; *People v. N. R. S. R. Co.*, 121 N. Y. 333, at p. 623; *State v. Standard Oil Co.*, 49 Ohio, 137.

away his means of gaining a livelihood or in the deprivation to society of the advantages of competition in skilled labor. At the present day there is not that danger; except possibly in the case of corporations. In their supervision, and in their restriction within the limits of their chartered powers, the government and the public are directly interested. When the provisions of agreements in restraint of competition tend beyond measures for self-protection and threaten the public good in a distinctly appreciable manner, they should not be sustained."

This care of the public interest has gone so far that the United States government exercising the power *parentis patriæ* as set forth in the opinions of its Supreme Court, revoked the charter of the church of the Latter Day Saints which had been granted under territorial government, and which it was argued had received the implied sanction of Congress.¹ This church was in effect the government of the territory. Possession of the property of the said corporation was taken under an order of the District Court by a receiver appointed by its decree who was to keep and control the same under the decree pending the final determination of the issues. On appeal it was held that the government may prohibit polygamy, even if the right to indulge in it is a religious belief, and when it is forbidden by law, property used for promoting such unlawful practice, but dedicated to charitable uses, and belonging to a defendant corporation may be protected from diversion, and be taken and devoted to objects of charity. "In this country the legislature or government of the State as *parens patriæ* has the right to enforce all charities of a public nature and where no other person is entrusted with it. The law of charities exists in Utah, and Congress has power to carry out that law, and put it in force in its application to the church of Latter Day Saints."

A corporation may be liable for conspiracy. The Buffalo Lubricating Oil Company brought actions against the Standard Oil Company, and the Acme Oil Company to recover damages alleged to have been caused by a conspiracy between defendants to injure plaintiff, and on

¹ U. S. R. S. 5352, Act of February 19, 1887. The ordinance of the "so called State of Deseret," re-enacted by the Territory of Utah, as also the pleadings set out in the report of *Late Corporation of Latter Day Saints v. U. S.*, 136 U. S. 1; see 150 U. S. 145; see, also, *Davis v. Beason*, 133 U. S. 333. This *cy pres* doctrine was not recognized in the State of New York. *Tilden v. Green*, 180 N. Y. at p. 45; but see *Atty.-Gen. v. Baliol College*, 9 Mod. 407; *Sopier v. Mass. Gen. Hospital*, 3 Cush. 483; *Paulet v. Clark*, 9 Cranch, 292. The legislature of New York in 1898 changed the rule in some respects.

demurrer its right was sustained.¹ On the other hand it may apparently enter into a trust, and a competitor and rival who buys stock in the trust can compel the transfer to be perfected as an incident of such purchase. It cannot cease to exist of its own will, its life continues until either the charter period has expired, or the court has decreed a dissolution; and even when it has been dissolved for a violation of its charter, its property and property rights including traffic contracts, and street rights or franchises survive, and its trustees become trustees for its creditors and stockholders.

Such are rules of public policy recognized by the courts in corporation affairs, and corporation rights may not be invaded by the State contrary to constitutional guarantees. For example, a statute of Iowa requiring every foreign corporation named in it to stipulate, as the condition of a permit to do business in Iowa, that it will not remove into the Federal court certain suits which by the laws of the United States it would have the right to remove, was held void, because it made the right to a permit to depend upon the surrender of a privilege secured to it by the Constitution and laws of the United States, and agreements to abstain in all cases from resorting to the courts of the United States are void as against public policy, although the State has the right to impose conditions to the transaction of business in its territory.²

The statement and definition of obligations attendant upon the grant of any franchise in *Thompson v. The People*³ have been often cited, and are in accord with both English and American decisions. Grants conferring franchises are contracts between the sovereign power and private citizens, made upon valuable consideration for purposes of public benefit as well as private advantage. Such a grant vests a private property in the grantee affected by public use. It may be considered

¹ *Buffalo L. O. Co. v. Standard O. Co.*, *Acme O. Co.*, 106 N. Y. 669; *Rice v. Rockefeller*, 184 N. Y. 174; see *Leslie v. Lorillard*, 110 N. Y. 519; *Havemeyer v. Havemeyer*, 43 Supr. Ct. 506; *Fisher v. Bush*, 85 Hun, 641; *People v. Ballard*, 184 N. Y. 269; *People v. O'Brien*, 111 N. Y. 1; *N. O. S. F. & L. R. R. v. Delamore*, 114 U. S. 501. Trusts in the guise of great corporations have become not infrequent, as witness the sugar, oil and cordage trusts.

² *Barron v. Burnside*, 121 U. S. 186; *Ins. Co. v. Morse*, 20 Wall. 445; see *Doyle v. Continental Ins. Co.*, 94 U. S. 535. Stipulations "to exclude from appropriate judicial tribunals any persons who, in the ordinary course of things, have a right to sue there," are deemed against public policy. 2 Story Eq. Jur. 457; 2 Phil. Ins. 1941.

³ *Thompson v. The People*, 28 Wend. 537; see synopsis of opinion of Sen. Verplanck, p. 539.

a public trust to be faithfully executed according to the purposes of its creation. "Nonuser or misuser is such a neglect or disregard of the trust, or such a perversion of it to the private purposes of the trustees as to lessen its utility or work some public injury."

Misuser may be a misdemeanor. "But for the omission of minor or accessory duties enjoined, none of which are strictly essential to the due execution of the trust, the proper remedies are mandamus, prohibition, injunctions, indictment, private action by the party aggrieved, or resort to such cumulative remedy short of proceedings for a forfeiture, as the legislature may have provided, unless the neglect of such duties are expressly declared cause of forfeiture." The graver remedy may be taken when the injury is serious and the transgression affects the welfare of the people, but, if possible, such decision will be reached as will not injuriously affect the existing rights.¹ Whether the intervention is because of acts *ultra vires*, as in the Sugar Trust cases, or because of the weighty reasons assigned in the Church case of the Latter Day Saints, where the highest interests of civil society are involved, and a contempt of authority and resistance to law on the part of the corporation may not be longer suffered, or it is simply to prevent a monopoly or a restraint of trade, as in the Chicago Gas Company case, and others allied to it, the common basis is public policy and action is induced by the necessity of protection secured by these judgments. This is instanced in the opinion of the court in the Sugar Trust case which seems to turn upon the doctrine of *ultra vires*, and the court says: "So having reached our conclusion that the defendant corporation has violated its charter, and failed in the performance of its corporate duties, in respects so material and important as to justify a judgment of dissolution, it is needless to advance into the wider discussion over monopolies and competition and restraint of trade." The consideration has been stated of police interests menaced, because of the "definite view of the injurious tendencies developed, by the combination which stands outside of the ward of the State, which dominates the range of an entire industry, and puts upon the market a capital stock proudly defiant of actual values, and capable of an unlimited expansion." The reasoning is the same throughout these

¹ N. Y. Laws 1886, chap. 268; 111 N. Y. 1; Act of Congress, Feb. 19, 1887; 136 U. S. 1, *Suburban R. T. Co. v. Mayor*, 128 N. Y. 510; 114 U. S. 501; *People v. Chicago G. T. Co.*, 130 Ill. 268; *People, ex rel. Peabody*, 130 Ill. 268; *Saratoga Co. Bk. v. King*, 44 N. Y. 87; *Arnot v. Pittston & E. C. Co.*, 68 N. Y. 558; 131 N. Y. 625, 635.

cases, whose distinction is found merely in the seriousness of the danger or injury apprehended and to be remedied.

Mr. Justice Finch tersely states in this case the proposition illustrated by many others, that it "is a violation of law for corporations to enter into a partnership." In this Sugar Trust case sixteen corporations had combined. In the Chicago Gas Company case four companies had joined. There the court says: "The control of the four companies by the appellees suppresses competition between them, and destroys their diversity of interests, and all motive for competition. So far as the appellee was organized with the object of purchasing and holding all the shares of the capital stock of any gas company in Chicago, or Illinois, it was not organized for a lawful purpose, and all acts done by it toward the accomplishment of such object are illegal and void.

"The word 'unlawful' as applied to corporations is not used exclusively in the sense *malum in se* or *malum prohibitum*. It is also used to designate powers, which corporations are not authorized to exercise, or contracts which they are not authorized to make, or acts which they are not authorized to do; or in other words, such acts, powers and contracts as are *ultra vires*. The business is of a public character. Companies engaged in such business owe a duty to the public. Any unreasonable restraint upon the performance of such duty is prejudicial to the public interest and in contravention of public policy.¹ Whatever tends to prevent competition between those engaged in a public employment or business impressed with a public character, is opposed to public policy and therefore unlawful; whatever tends to create a monopoly is unlawful as being contrary to public policy. The common law will not permit individuals to oblige themselves by a contract either to do or not to do any thing, when the thing to be done or omitted is in any degree injurious to the public. If contracts and grants whose tendency is to create monopolies are void at common law, then where a corporation is organized under a general statute, a provision in the declaration of its corporate purposes, the necessary effect of which is the creation of a monopoly, will also be void."

In a few instances combinations whose restraint was only partial and caused no injury have been permitted as in *Leslie v. Lorillard*; *Shrews-*

¹ 130 Ill. 268; *Coke Co. v. C. Co.*, 131 Ill. 530; *Gibbs v. Gas Co.*, 130 U. S. 396; *Franklin Co. v. Institution*, 68 Me. 48; *Bank v. Bank*, 36 Ohio St. 350; *Bank v. Agency Co.*, 24 Conn. 159; *Hazelhurst v. R. R. Co.*, 43 Ga. 582; *Oregon R. & N. Co. v. O. R. R. Co.*, 130 U. S. 1; *Coal Co. v. Coal Co.*, 68 Pa. St. 178; *Chappel v. Brockway*, 21 Wend. 159; see *N. O. Gas Co. v. L. G. Co.*, 115 U. S. 650.

bury & Birmingham Railway Company v. Stour Valley Railway Company, and Central Shade Roller Company v. Cushman. But one corporation cannot purchase the capital stock of another to obtain or control its business unless it have statutory authority therefor. In the Chicago Gas Company case, cited above, it is said such a company "might take the stock of another corporation in payment of a debt, or perhaps as security for a debt, but the actual purchase of such stock is not directly and immediately appropriate to the execution of a specially granted power to operate gas-works and manufacture gas. Some corporations like insurance companies may find it necessary to keep funds on hand for the payment of losses, but it is questionable whether even these can invest their surplus funds in the stocks of other corporations without special legislative authority." This is a matter regulated by statutes in most of the States, and in *Fisher v. Bush* an additional reason is given for this restriction in that "shares in stock are dealt in by the trading and mercantile community on a large scale and pass from hand to hand the same as money at their accepted market value."

In two English cases principal consideration was given to the "unlawful attempt to effect that which Parliament alone could authorize and was against public policy." In *Great Northern Railway Company v. Eastern Counties Railway Company*, one company delegated to the other without legislative authority all the powers conferred on it by Parliament. In *Richmond Water-Works Company and Southwark and Vauxhall Water-Works Company v. Vestry of Richmond (Surrey)*, the Richmond company having under an act of Parliament the right to supply the district with water, laid its mains, and for a number of years continued their use, until its place of supply became unsuited for the purpose, and the stockholders in the Southwark Company bought up its stock. Eventually that company bought the mains and for thirteen years supplied the water and drew the pay for it, although without any authority to enter that territory. The suburban health authority proposed to lay down pipes and furnish water, but were met by an application for an injunction in a suit brought by the two companies, but the court held, this fell within the rule in the *Railway companies case* cited and must be denied.

¹ 110 N. Y. 519; 2 D. M. & G. 866; 143 Mass. 353; *Fisher v. Bush*, 35 Hun, 644; *Gr. Nor. R. Co. v. Eastern Counties R. Co.*, 9 Hare, 306; *Richmond Water-Works and S. and V. W. Co. v. Vestry of Richmond*, 3 Chan. Div. 82.

In *New York and Sharon Canal Company, and Sharon Canal Company v. Fulton Bank*, Chief Justice Savage says,¹ that "general principles are against the power of corporations to consolidate others or form a partnership. Corporations at common law have no such powers as would authorize the forming of a partnership or the consolidation of the corporations in one." Parliament has enacted special statutes in certain cases, and in a number of the States, among them New York, Missouri and Georgia, general statutes have been passed, permitting consolidation in such form, that a new corporation with separate responsibility is formed. By such consolidation the original companies are dissolved, and a new corporation takes their place subject to their existing obligations of the old companies. Consolidation is a surrender of the old charter by the companies, the acceptance thereof by the legislature, and the formation of a new company out of such portions of the old as enter into the new."

In *Pullman Palace Car Company v. Missouri Pacific Railway Company* it was held that an agreement made by one of the companies before the consolidation, to be carried out on its entire line of railway, and all roads which it then controlled, or might thereafter control by ownership, lease or otherwise, did "not affect roads not so owned, leased or acquired at the time of the consolidation, but acquired by the new company subsequently." Chief Justice Waite said: "The new company assumed on the consolidation all the obligations of the old Missouri Pacific. The power of the old company to get control of the other roads ceased when its corporate existence came to an end. Contracts thereafter made to get control of the other roads would be the contracts of the new consolidated company. It follows that the present Missouri Pacific Company is not required by the contract of the old company to have the Pullman cars on the road of the St. Louis, Iron Mountain and Southern Company, even if it does now control that road within the meaning of the contract." The court further was of the opinion that the last-mentioned railroad would not in any event be bound by the contract of the Missouri Pacific Company, because it kept up its own corporate organization and operated its own road. "The Missouri Pacific owns all or nearly all its stock, and in that way can determine who shall constitute its board of directors, but there the

¹ *N. Y. Sharon C. Co., and S. C. Co. v. Fulton Bank*, 7 Wend. 412; *R. R. Co. v. Georgia*, 98 U. S. 359-363; *McMahon v. Morrison*, 16 Ind. 172; *Lauman v. Lebanon Valley R. R.*, 80 Pa. St. 42; 121 N. Y. 624; *Pullman Pal. Car Co. v. Missouri Pac. R. R.*, 115 U. S. 587.

power of that company over the other management stops. The board when elected has controlling authority, and for its doings is not necessarily answerable to the Missouri Pacific Company."

This double allegiance of those who act for the corporation is not admissible. In *Whittenton Mills v. Upton*, the partnership declared illegal was between a corporation and an individual, and was now in its second term, having been extended. The opinion of the court in the Sugar Trust cases¹ says of this: "The case last cited furnishes the reasons with precision and at length. It demonstrates that the vital characteristics of the corporation are of necessity drowned in the paramount authority of the partnership."

Incident to this discussion, and also touching the rights of stockholders involved in the refusal of courts to enforce contracts contrary to public policy, is the rule against pooling contracts. In *Williams v. Montgomery*² the Supreme Court of New York has lately held, that a contract whereby stockholders of a corporation agree to deposit their certificates of stock with a trustee for six months, for the purpose of preventing any disposition of the stock during that time, is unenforceable and void, as contrary to the statute law of the State, and against public policy. The court says "persons cannot agree to surrender the control and ownership of property belonging to them for a definite period, and enforce any such an agreement in any court of justice. It seems to us upon the whole case, entirely independent of the question as to whether it was necessary for Montgomery to acquire the title to this stock in order that he might procure money to relieve the company from embarrassment, and as to what his purpose was, that the agreement under consideration was impossible to be enforced."

In *Fremont v. Stone*,³ the defendant made an agreement with the plaintiffs, by which they stipulated that, on the payment by him of \$200,000, for a certain number of shares of the capital stock of a railway company then belonging to them, new directors to be nominated.

¹ See opinion of Judge Finch, *People v. N. R. S. R. Co.*, 121 N. Y. 623, 624; *Whittenton Mills v. Upton*, 76 Mass. 582; *R. R. Co. v. Georgia*, 98 U. S. 359; 7 Wend. 412; 9 Hare, 306; *Starbuck v. Mercantile Trust Co.*, *Shepaug Voting Trust cases*, 60 Conn. 558; *Gale v. Kalamazoo*, 23 Mich. 844; *Gibbs v. Cons. Gas Co.*, 130 U. S. 396; *Railway Co. v. State*, 49 Ohio, 668.

² *Williams v. Montgomery*, 68 Hun, 416. The power of a corporation to buy its own stock is disputed, but generally allowed in the United States. *Tayl. Corp.* §§ 184, 185; *Zulueta's Claim*, L. R., 5 Ch. 444; *Re Marsailles*, L. R., 7 Ch. 161; *Clapp v. Peterson*, 104 Ill. 80; see, however, *Coffin v. Greenleaf & Co.*, 38 Ohio, 275.

³ *Fremont v. Stone*, 42 Barb. 169; *Fisher v. Bush*, 35 Hun, 641.

by the plaintiff and his co-purchaser, should be substituted in the place of all the other directors except two. It was held that "the contract was an attempt improperly to interfere with the rights of others and was clearly contrary to public policy." In *Fisher v. Bush*, the complaint alleged that the defendant and eight other persons signed the following sealed instrument: "For value received from and paid to each other, we, the undersigned, stockholders of the Genesee Valley Canal and Railway Company mutually agree with the other and to all, that we will not sell, assign, set over, pledge or grant power of attorney to vote, or agree to sell, assign, transfer, set over, pledge or give power of attorney to vote in any way, shape or manner the stock which we respectively and individually own, hold or possess in said company, without the concurrent consent of all signers to this instrument. * *

* * This agreement is made for mutual protection and to prevent the sale of the company's franchise by a majority of the members of the present board of directors, who are and who represent a minority of the shares of the capital stock of this company." The agreement was held "void, because in restraint of trade and against public policy, and because the clause providing that none of the signers should vote by proxy was a pernicious and unlawful provision, and because not founded upon an adequate and sufficient consideration."

It has been held that any stockholder, although his stock has been pooled, may at any time demand back his stock, even if the pool be for a limited time, and the stockholders have received receipts made transferable like stock certificates.¹ In *Starbuck v. Mercantile Trust Company*, a syndicate purchased a majority of the capital stock of the Shepaug Railroad Company, which was placed in a voting trust for five years. The apparent object was to extend the railroad to tide-water and form a connection with another road, but there was a secret purpose to make a profit out of the construction. Money was borrowed by the financial agent of the syndicate, on a portion of the trust certificates, which were issued directly to him, and transfers in blank upon the back of the certificates were signed by this agent, when they were pledged as security for loans. Before connection at tide-water was affected, the agent became insolvent, the loans were not paid and the pledged certificates were sold at public sale, and most of them were

¹ *Moore v. Bank Com.*, 52 Mo. 377; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; *Woodruff v. Dubuque, etc.*, R. R., 30 Fed. R. 91; *Starbuck v. Mercantile Trust Co.*, 9 Rway. & Corp. L. J. 293, and 60 Conn. 553, Ed. N. Y. L. J., May 4, 1893; *Crawford v. Wick*, 18 Ohio, 19.

bought by the plaintiffs. They covered seven thousand shares, and the plaintiffs, with other stock purchased, not in the trust, held eighty-five per cent of the whole capital stock. The plaintiffs thereupon notified the trust company which held the original stock, that they revoked the powers given by the trust agreement and demanded the stock. This demand was refused. The court held the trust agreement void as a violation of the duties of directors, and against the policy of the law; and that the plaintiffs had a right to revoke the powers given to the trust company by the agreement, and to have transferred to them, on the surrender of trust certificates, as many shares of the stock as the certificates represented.

The tyranny of force unrestrained by consideration for private rights and the established principle of society is opposed by public policy. In blacklisting, boycotting and strikes, the law where applied to, draws its line through abuses which have given rise to these terms and receive its condemnation. No lawful intent can be found in illegal action which tends to injury from its nature and is subversive of freedom of action, freedom in trade and good order. In *Rogers v. Evarts*¹ the court says, "If they seek to accomplish a lawful end by unlawful means then they are guilty of illegal conspiracy," and the posting of names may be a part of a conspiracy. Or as Mr. Justice Barrett said in *People v. Kostka*, "Nor is it necessary that there should have been a direct threat. If you believe that the attitude actually presented by the distributors of circulars was an attitude of intimidation either to passers by, or to the women inside, considering all the circumstances, then all who participated in it directly or indirectly are within the meaning of the word 'intimidation' as used in the Conspiracy Act."

"Each case," says the court in *Rogers v. Evarts*, "must probably depend upon its own surroundings. Rights guaranteed by law will be enforced by the courts whether invoked by employer or employee." This decision touches also upon the publications of newspapers, and says, when their accounts of an unlawful conspiracy are so colored as to express approval and encouragement, they have overstepped the lawful province of journalism and come within the condemnation of law." The statutes enacted as measures of relief, including those for Boards of

¹ *Rogers v. Evarts*, 17 N. Y. Supp. 364; *People v. Kostka*, 4 N. Y. Cr. 434. *Walker v. Cronin*, 107 Mass. 564; *Mogul S. S. Co. v. McGregor*, 28 Q. B. Div. 506; *S. S. Co. v. McKenna*, 80 Fed. R. 48.

Arbitration, are principally to avoid or punish combinations and conspiracies.¹

Blacklisting may involve a question of privilege.² The court will take judicial notice of the nature of the business and office of mercantile agencies, has been held in cases where communications affecting the credit of merchants have been the subject of controversy; and again in respect to a list of discharged employees, it has been said by the court, "We realize how important some such system as this must be for the protection of persons or corporations employing a large number of men, as well as to the public."

In *Rogers v. Evarts* it was said the posting of names of those who contribute to funds sought and lawfully used for sustaining the strike, and of those who refuse to contribute, is lawful as long as the strikers keep within the law. "In *Williams v. Smith*, a publication in the *Hatter's Gazette*, London, for December, 1887, of a judgment against the plaintiff in a column known as a *black list* was held libellous," and in *Sunderlin v. Broadstreet* the proprietors of a mercantile agency were held liable for a false report injurious to the subject of it, published among the patrons of the agency, and it was said: "Such a communication is privileged only when it is confined to those who have no interest in the information."

In *Missouri Pacific Railway Company v. Behee* the Court of Civil Appeals of Texas held that "a publication by a railroad company of a list of employees discharged for cause, which is issued to prevent unsuitable men being re-employed on other parts of the road, is a privileged communication; and though a person is named therein as discharged for incompetency, whereas in fact he voluntarily left the company's employment, he cannot recover damages unless express malice be shown. Where plaintiff, a brakeman, thus wrongfully included in the list, went to the company's trainmaster, who had hired him, and called his attention to the injustice done him by the publication, and the trainmaster, after investigation, gave him a written statement that he

¹ See Crimes Act, England, 1887; Anti-Trust Act, July 2, 1887; 26th Vol. U. S. Stat. at L., chap. 647; N. Y. Penal Code, § 168; N. Y. L. 1887, chap. 68, "An act to provide for the amicable adjustment of grievances and disputes that may arise between employers and employees and to authorize the creation of a State Board of Arbitration."

² *Eaton C. & B. Co. v. Avery*, 83 N. Y. 31; *Woodruff v. Bradstreet Co.*, 116 N. Y. 233; but see *King v. Patterson*, 49 N. J. L. 417; *Sunderlin v. Bradstreet*, 48 N. Y. 188; *Williams v. Smith*, 22 Q. B. Div. 134; 39 Alb. L. J. 247; *Missouri Pac. R'way v. Behee*, 21 S. W. R. 384.

had not been discharged for incompetency, but had left the service of his own volition, and after this the company reissued the publication in which his name appeared as before, a verdict finding malice and awarding damages will not be disturbed." The court said: "Under previous decisions of our Supreme Court it is quite plain that this publication, made under the circumstances and for the purpose set forth in the conclusions of fact, must be regarded as privileged, and, though false, damages cannot be recovered therefor against appellant unless express malice be shown." * * * "At the same time, where an unfounded publication has been repeated, under the circumstances detailed above, we cannot say that the verdict of the jury finding malice in fact is not sustained by the evidence." * * *

In *International Railway Company v. Greenwood*¹ the same court held on demurrer that damages sustained by an innkeeper through acts of the company in threatening to discharge from its employment any men who should patronize him, "either by eating at his house or drinking at his bar, and in actually discharging employees because of their patronage of the plaintiff," could be recovered. "Appellant did not have the right to intentionally induce others to abstain from patronizing appellee except for a legitimate purpose. According to the allegations, it did, by threats of unlawful discharge, cause its servants to withdraw their patronage, with intent to injure appellee. This was not the exercise of a legal right, as contended, and the second proposition of appellant cannot be sustained. What we have said applies only to the rights of the master with reference to servants already in his employ. It is proper to say, in regard to the alleged notice, that appellant would not take into its service any one who might patronize appellee, that appellant had the right to determine for itself whom it would thereafter employ, and the reasons upon which it might act concern no one but itself. To what extent a master might exercise his influence with his employees, to promote their welfare, as well as to protect his own interests, which are dependent upon their action, is not involved in the decision of this demurrer. The petition excludes the idea that the action complained of was taken for any legitimate purpose."

¹ *Int. & Greenl. N. R. R. Co. v. Greenwood*, 21 S. W. R. 559; *Bradstreet Co. v. Gill*, 72 Tex. 121; *Behoe v. R. R. Co.*, 71 id. 424. A somewhat different view is taken in *Payne v. Railroad Co.*, 18 Lea, 507; and see *Lumley v. Gye*, 2 El. & Bl. 216; *Bowen v. Hall*, 6 Q. B. Div. 343.

In *Heywood v. Tillson*¹ the plaintiff was the owner of a dwelling-house on Hurricane Island, where the defendant was proprietor of the island, and engaged in quarrying granite. There was no opportunity to lease the house except to those in the employ of the defendant, who interfered and threatened to discharge and expel from the island any one who should lease and occupy the house, claiming on the trial that the house was in poor condition and not a healthful place. The court sustained the right of the defendant to refuse to employ or to retain in his service any person renting certain premises, and held that the owner of the premises had no right of action for the exercise of this right, even though it were through malice or ill-will. Mr. Bishop states the proposition in these words: "No one can, in the absence of contract, require another to employ him; so that to refuse employment is not a legal injury. Therefore, where a person maliciously kept the owner of a house from letting it by announcing that he would not hire any one who should take it, he inflicted no legal injury on the owner." The peculiar circumstances which called forth this decision, and the fact that only the employees of the defendant were on the island, seem frequently to be passed over when the case is cited.

A more recent case, involving the right of dealers in merchandise, was decided in the Supreme Court in Minnesota, July 20, 1893, in *Bohn Manufacturing Company v. Hollis*, and has been often referred to since that time. There it was held, that where a number of retail dealers formed a voluntary association, mutually agreeing that they would not deal with any manufacturer or wholesale dealer who should sell directly to consumers not dealers, at any point where a member of the association was carrying on a retail yard; and they had provided in their by-laws that wherever any wholesale dealer or manufacturer made any such sale, the secretary should notify all the members of the fact; and when the secretary threatened to send notice that such a sale had been made, which notice was to be sent to all the members of the association, such facts presented no grounds for an injunction against such association.

The court, by Mitchell, J., said: "The plaintiff is a manufacturer and vendor of lumber and other building material, having a large and profitable trade, at wholesale and retail, in this and adjoining States, a large and valuable part of this trade being with the retail lumber dealers. The defendant, the Northwestern Lumberman's Association, is a

¹ *Heywood v. Tillson*, 75 Me. 225; Bish. Non-Con. Law, chap. X, § 144.

voluntary association of retail lumber dealers, comprising from twenty-five to fifty per cent of the retail dealers doing business in the States referred to, many of whom are, or have been, customers of the plaintiff. A "retailer," as defined in the constitution of the association, is "any person who is engaged in retailing lumber, who carries at all times a stock of lumber adequate to the wants of the community, and who regularly maintains an office as a lumber dealer and keeps the same open at proper times." Any wholesale dealer or manufacturer of lumber who conforms to the rules of the association may become an honorary member and attend its meetings, but is not allowed to vote. The object of the association is stated in its constitution to be: "The protection of its members against sales by wholesale dealers and manufacturers to contractors and consumers." When reduced to its ultimate analysis, all that the retail lumber dealers in this case have done is to form an association to protect themselves from sales by wholesale dealers or manufacturers directly to consumers or other non-dealers, at points where a member of the association engaged in the retail business.

The means adopted to effect this object are simply these: They agree among themselves that they will not deal with any wholesale dealer or manufacturer who sells directly to customers, not dealers, at a point where a member of the association is doing business, and provide for notice being given to all their members whenever a wholesale dealer or manufacturer makes any such sale. That is the head and front of defendants' offense. It will be observed that defendants were not proposing to send notices to any one but members of the association. There was no element of fraud, coercion or intimidation, either toward plaintiff or the members of the association. True, the secretary, in accordance with section 3 of the by-laws, made a demand on plaintiff for ten per cent of the amount of the two sales. But this involved no element of coercion or intimidation, in the legal sense of those terms. It was entirely optional with plaintiff whether it would pay or not. If it valued the trade of the members of the association higher than that of non-dealers at the same points it would probably conclude to pay; otherwise not. It cannot be claimed that the act of making this demand was actionable; much less that it constituted any ground for an injunction; and hence this matter may be laid entirely out of view. Nor was any coercion proposed to be brought to bear on the members of the association to prevent them from trading with the plaintiff. After they received the notices they would be at entire

liberty to trade with plaintiff or not, as they saw fit. By the provisions of the by-laws, if they traded with the plaintiff they were liable to be "expelled"; but this simply meant to cease to be members. It was wholly a matter of their own free choice, which they preferred — to trade with the plaintiff or to continue members of the association.

The case presents one phase of a subject which is likely to be one of the most important and difficult which will confront the courts during the next quarter of a century. This is the age of associations and unions, in all departments of labor and business, for purposes of mutual benefit and protection. Confined to proper limits, both as to end and means, they are not only lawful, but laudable. Carried beyond those limits, they are liable to become dangerous agencies for wrong and oppression. Beyond what limits these associations or combinations cannot go without interfering with the legal rights of others is the problem which, in various phases, the court will doubtless be frequently called to pass upon. There is perhaps danger that, influenced by such terms of illusive meaning as "monopolies," "trusts," "boycotts," "strikes," and the like, they may be led to transcend the limits of their jurisdiction and, like the Court of King's Bench, in *Bagg's case*, assume that on general principles they have authority to correct or to reform every thing which they may deem wrong, or as Lord Ellsmere puts it, "to manage the State." But whatever doubts or difficulties may arise in other cases presenting other phases of the general subject involved here, it seems to us that there can be none on the facts of the present case. Both the affidavits and brief in behalf of the plaintiff indulge in a great deal of strong and even exaggerated, assertion, and in many words and expressions of very indefinite and illusive meaning, such as "wreck," "coerce," "extort," "conspiracy," "monopoly," "drive out of business," and the like. This looks very formidable, but in law, as well in mathematics, it simplifies things very much to reduce them to their lowest terms.

It is conceded that retail lumber yards in the various cities, towns and villages are not only a public convenience, but a public necessity; also that to enable the owners to maintain these yards they must sell their lumber at a reasonable profit. It also goes without saying, that to have manufacturers or wholesale dealers sell at retail, directly to consumers, in the territory upon which the retail dealer depends for his customers, injuriously affects and demoralizes his trade. This is so well recognized as a rule of trade in every department, that generally wholesale dealers refrain from selling at retail within the territory

from which their customers obtain their trade. No case can be found in which it was ever held that at common law a contract or agreement in general restraint of trade was actionable at the instance of third parties, or could constitute the foundation for such an action. The courts sometimes called such contracts "unlawful" or "illegal," but in every instance it will be found that these terms were used in the sense merely of "void" or "unenforceable" as between the parties, the law considering the disadvantage so imposed upon the contract a sufficient protection to the public. (*Steamship Co. v. McGregor*. What one man may lawfully do singly, two or more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful. The gist of a private action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. It can never be a crime to combine to commit a lawful act, but it may be a crime for several to conspire to commit an unlawful act, which, if done by one individual alone, although unlawful, would not be criminal. Hence the fact that the defendants associated themselves together to do the act complained of is wholly immaterial in this case. We have referred to this for the reason that counsel has laid great stress upon the fact of the combination of a large number of persons as if that of itself rendered their conduct actionable."

"With these propositions in mind, which bring the case down to a very small compass, we come to another proposition which is entirely decisive of the case. It is perfectly lawful for any man (unless under contract obligation, or unless his employment charges him with some public duty) to refuse to work for or to deal with any man, or class of men, as he sees fit.¹ This doctrine is founded upon the fundamental right of every man to conduct his own business in his own way, subject only to the condition that he does not interfere with the legal rights of others. And, as has been already said, the right which one man may exercise singly, many, after consultation, may agree to exercise jointly, and make simultaneous declarations of their choice

¹ *Com. v. Hunt*, 4 Metc. 111; *Carew v. Rutherford*, 106 Mass. 1; *Steamship Co. v. McGregor*, 23 Q. B. Div. 598; *Parker v. Huntington*, 2 Gray, 124; *Wellington v. Small*, 8 Cush. 145; *Payne v. Railway Co.*, 18 Lea, 507; *Bohn Manufacturing Co. v. Hollis*, 55 N. W. R. 1119; see *contra*, *Judd v. Harrington*, 139 N. Y. 105; 34 N. E. R. 790; *Toledo, etc., R. R. v. Pa. Co.*, 54 Fed. R. 746; *People v. Sheldon*, 34 N. E. R. 785; 139 N. Y. 251; *Cote v. Murphy*, 28 Atl. R. 190; *Greenfield v. Gilman*, 140 N. Y. 168.

This has been repeatedly held as to associations or unions of workmen, and associations of men in other occupations or lines of business must be governed by the same principles. Summed up and stripped of all extraneous matter, this is all that defendants have done, or threatened to do, and we fail to see any thing unlawful or actionable in it."

In *Crawford and Murray v. Wick*, a contract between the lessee and lessor of a mine that lessee shall exercise his influence over his employees to induce them and their families to purchase goods, wares and merchandise only at the store of the lessor; that the lessee will not accept any order given upon him by his employees for goods purchased of any other persons or firm; or give to any employee an order on any other store, nor any note or other evidence of indebtedness to be transferred to any other store for goods, was held to be unlawful, in restraint of trade, to the injury of others, and tending to monopoly and oppression.

In a well-considered case in the Superior Court of Cincinnati in 1892, where the prevailing tendency of modern days, to allow a greater liberty of action even in combinations to advance by lawful means private interests, is maintained, the court remarks in dividing the responsibility of several defendants, granting an injunction against some of them, and dismissing the application as to the others,¹ "that the appointment by striking workmen of a committee of their members to visit the neighborhood of each factory, whose regular workmen are on a strike, for the purpose of reporting to the striking workmen the members of workmen employed by the factory, and the addresses of such workmen, may be legal or illegal, according to the manner in which such mission is performed. It is lawful for workmen to endeavor by reasonable agreements, to induce others, who have not hitherto acted with them to do so; but it is unlawful for them by threats, intimidation, molestation or compulsion to interfere with the exercise of free will of such other workmen," as was said in *Regina v. Rowlands*, "the rights of workmen are conceded, but the exercise of free will and freedom of action within the limits of the case is also equally secured to the masters."

¹ *Crawford and Murray v. Wick*, 18 Ohio, 190; *Perkins, Campbell & Co. v. Rugg and others*, 28 Weekly L. B. 82; see *Ray Con. Lim.* 378, 388; *Reg. v. Rowland*, 17 A. & E. (N. S.) 671; *U. S. v. Kane*, 23 Fed. R. 748; *Farrer v. Close*, L. R., 4 Q. B. 612; *Wood, Master and Servant*, §§ 230, 241. As to malicious interference with contracts, see *N. Y. L. J.*, ed. Aug. 14, 1893; *Bowen v. Hall*, 6 Q. B. Div. 348; *Walker v. Cronin*, 107 Mass. 555; *Boulier v. Macauley* (Ky.), 15 S. W. R. 60; *Chambers v. Baldwin*, id. 57; *Jones v. Stanley*, 76 N. C. 355; *Haskins v. Royster*, 70 N. C. 601.

To boycott is¹ defined in the Century Dictionary as a word introduced into Ireland from the name of the first victim of the system, a farmer of Lough Mask, Connemara, in 1880. "Introduced into America it implies the persecution of an individual by organized force." Another authority describes it as "a system of combining to hold no relations, social or commercial, with a neighbor in order to punish him for differences in political opinion." A kind of social excommunication. The term *exclusive dealing* has been applied by apologists to boycotting, which was brought within the law by the Crimes Act of 1887." The Supreme Court of Connecticut in *State v. Glidden* held that "a boycott, as that term is used by organizations of laboring men in this country, is a conspiracy at common law, and the means by which it is in general sought to be accomplished, are not only unlawful, but in some degree criminal." In *Carew v. Rutherford*, the Massachusetts court held that conspiring to obtain money from a master mechanic, which he is under no legal duty to pay, by threatening to induce workmen required in his business to leave his employment, and to prevent others from entering it, so as to render him reasonably apprehensive that he cannot carry on his business without making the payment, is illegal, and the money paid, and the damage to his business may be recovered by the employer in an action of tort.

In *Blindell v. Hagan*,² it appeared a ship was held in port for lack of a crew, while other vessels were furnished and left, because of an illegal combination of persons to prevent shipments except on terms approved by them. The application to the court was made by alien friends, not citizens, and, in part, under the law of Congress to protect trade and commerce against unlawful restraints, whereby the Circuit Courts of the United States are invested with jurisdiction to prevent and restrain violations of the act. This statute was construed only to authorize injunctions at the instance of the government, but, on the general ground of equity jurisdiction, to prevent a multiplicity of

¹ Century Dict. s. v. Boycott; New Eng. Dict., id.; Quarterly Review, 1881, 117; Spectator, Jan. 23, 1881, 119; Chambers' Ency., New ed., 1892, s. v. Boycotting, Conspiracy, Boycotts, attempt to injure or interfere with a business; *State v. Glidden*, 55 Conn. 47; 8 Atl. R. 89; see *Mitchell v. State*, 42 Ohio St. 385; 2 Amer. & Eng. Ency. of L. 512; *Moores & Com. v. Bricklayers' Union No. 1 et al.*, 23 Weekly L. B. 48; *Blindell v. Hagan*, 54 Fed. R. 40; *Carew v. Rutherford*, 106 Mass. 1; see editorial N. Y. L. J., Nov. 13, 1893, *Boycotts and Trade Combinations*; *People v. Hughes*, 137 N. Y. 29.

² *Blindell v. Hagan*, 54 Fed. R. 40; 26 U. S. Stat. at L., chap. 647, p. 209, § 4; *Springhead Spinning Co. v. Riley*, 6 Eq. Cases, 557.

suits, and because damages at law would be conjectural and not easily susceptible of proof, the court ordered an injunction as prayed for, against several of the defendants.

This remedy of injunction has been frequently applied against the participants in, and agents of, unlawful combinations against individuals and business, as was said by Vice-Chancellor Malins, in *Springhead Spinning Company v. Riley*, "the jurisdiction of the court is to protect property, and it will interfere, by injunction, to stay proceedings against it whether connected with crime or not." The criminal element is found in most of these cases, but though punishable, yet the equitable right is also accorded. In *United States v. Kane*,¹ the court asserts its authority against acts of conspirators seeking to prevent a receiver appointed by the court from operating a railroad, and informs those who resort to threats, with or without actual violence, and by "overawing others, by preconcerted demonstrations of force, to accomplish an unlawful purpose," that they are guilty of contempt of court, and may be punished for their lawless acts.

In the *Matter of Higgins*, the same statement was made in another Circuit Court of the United States by Judge Pardee, and that "it is well settled law that whoever unlawfully interferes with property in the possession of the court is guilty of contempt of that court, and I regard it as equally well settled that whoever unlawfully interferes with officers and agents of the court in the full and complete possession and management of the property in the custody of the court, is guilty of contempt of court, and it is immaterial whether this unlawful interference comes in the way of actual violence or by intimidation or threats. The employees of the receivers, although *pro hac vice* officers of the court, may quit their employment as can employees of private persons or corporations, provided they do not intentionally disable the property; but they must quit peaceably and decently. Where they combine and conspire to quit, with or without notice, with the intent of crippling the property or its operation, I have no doubt they thereby commit a contempt, and all those who combine and conspire with employees to thus

¹ *U. S. v. Kane*, 28 Fed. R. 748; this decision, in 1885, of Judge Brewer, in the U. S. Circuit Court of Colorado, foreshadows the decisions of Judges Ricks and Taft in the *Ann Arbor* case, in the U. S. Circuit Court at Toledo, April 3, 1893, 54 Fed. R. 730, and of Judge Spear, in the *Brotherhood of Locomotive Engineers* case, in U. S. Circuit Court, Georgia, April 8, 1893. See *In re Higgins*, 27 Fed. R. 444. See, also, *Cœur d'Alene Cons. M. Co. v. Miners' U. of W.*, 51 Fed. R. 260; *Judd v. Harrington*, 84 N. E. R. 790; 139 N. Y. 105; *Sinsheimer v. N. G. W.*, N. Y. Super. Ct., N. Y., Nov., 1898, opinion by Ingraham, J.

quit, or, as officials of labor organizations, issue printed orders to quit or to strike, with an intent to embarrass the court in administering the property, render themselves liable for contempt of court."

Judge Spear goes further in his opinion, bringing under the operation of the penal clauses of the Conspiracy and Interstate Commerce Acts of the United States, combinations of persons without regard to their occupations, which will have the effect to defeat the provisions of the commerce laws. He adds: "Now, it is true that in any considerable strike upon the transportation lines of this country, whether main lines or branch roads, there will be interference with interstate and foreign commerce. This will be true also of strikes upon telegraphic lines, for the exchange of telegraphic messages between people of different States is interstate commerce. In the presence of these statutes which we have cited, and in view of the intimate interchange of commodities between people of different States of the Union, it will be practically impossible hereafter for a body of men to combine to hinder or delay the work of the transportation company without becoming obnoxious to the provisions of these statutes, and a combination or agreement of railroad officials or other representatives of capital with the same effect will be equally under the ban of these penal statutes."

Pervaded by these views the courts issuing injunctions will reach the same result as suggested by Judges Brewer and Pardee, that those resisting or interfering with the exercise of their authority will be amenable to punishment for contempt. This conclusion is brought into effect in the decision of Judges Ricks and Taft in March of this year in the injunction against the strike of engineers on the Toledo & Ann Arbor Railroad, and the boycotting of freight offered by that line to connecting lines. The defendants were held to bail, and the court informs them that "the order of the court was made in this case after due consideration, with full knowledge of its scope and possible consequences, and with the firm purpose to enforce it in its letter and spirit, without unnecessary hardship, but with such promptness and vigor as might become necessary to give full protection to all concerned. You are now before the court upon an order based on affidavits to show cause why you should not be attached, etc. You cannot always choose your own time and place for terminating relations. If you were permitted to do so, you might quit your work at a time and place, and under circumstances which would involve irreparable damage to your employer and jeopardize the traveling public. This court does not assume the power to compel you to continue your service to your em-

ployer against your will, but it does undertake to compel you to perform your whole duty while such relations continue, and does further claim, for the purpose of ascertaining whether its orders have been violated, the right to determine when your relations with your employer terminate, and when your obligations to observe this order cease."

It is perhaps not strange that there have been variant tendencies in the treatment of these questions by the courts within the last few years, and their full importance was not at first comprehended. The decision in *State v. Glidden*, in 1887, concludes with significant words: "Instances are not wanting where the boycott has been attended with more or less violence, and it cannot be denied that the natural tendency is, especially when applied by the ignorant and the vicious, to attempt to make it successful by force. It too often leads to serious disturbances of the peace, and even murder. We are loath, however, to assume that these defendants intended such consequences. Nevertheless it is a dangerous instrumentality to use, and if those instigating and resorting to it do not of their own accord take notice of its peril and voluntarily abandon its use, as we sincerely hope they will, the courts will be called upon to recognize its dangerous tendency and treat it accordingly."

The same public policy which demanded new statutes against conspiracy, restraints of trade and for the protection of commerce, has now a necessity for their application to disturbances not originally contemplated. In *United States v. Patterson*,¹ there was an indictment under the Anti-Trust Law, and sustained in an elaborate opinion by Mr. Justice Putnam as to four counts, those "which allege a purpose of engrossing, monopolizing or grasping the entire trade in question. Such being the case, acts of violence or intimidation may be alleged as the means to accomplish the general purpose. Instead of lying outside of the statute, they aggravate the offense. Violence and intimidation are as much within the mischief of the statute as negotiations, contracts or purchases. The former are often used to compel the latter."

Trade and commerce are held to mean substantially the same thing, and agreements, combinations and conspiracy are under this statute treated as synonymous. The consequences and liability following lawless acts of an individual conspirator have had much attention.

¹ U. S. Cir. Ct., Mass., March, 1898; *U. S. v. Patterson*, 55 Fed. R. 605; chap. 647, U. S. L. 1890; see opinion of Patterson, J., N. Y. Sup. Ct., Sp. T., May 25, 1898, *Dueber W. Man. Co. v. E. Howard W. & C. Co.*, and opinion of Mr. Justice Core, in U. S. Cir. Ct., N. Y., May 23, 1898, in cases between same parties.

Where there has been a concert of action in an agreement to do some unlawful thing, then all are liable is the well-established rule, and in *United States v. Kane* and *Perkins v. Campbell*, it is illustrated in the opinions of the court. If, however, "a number of persons have agreed to do a lawful act in a lawful manner, and one of them for the purpose of accomplishing the concerted purposes does an unlawful act, the offending individual is alone responsible."

Strikes have their peculiar features and their incidents, including combinations, meetings, persuasions, picketing, etc., are discussed in detail in *Rogers v. Evarts*,¹ where an injunction was asked because of the allegations that after the defendants had begun a strike, and other workmen had been employed in plaintiff's factory, they induced the new employees to leave by threats of violence, intimidation and persuasion. "It was admitted that it is a violation of law to induce a servant to leave his master's employment, or to induce workmen to refrain from entering into employment by means of any threat or violence; and it was further admitted that it was a violation of law for strikers to assemble before a factory in such numbers as to intimidate those who are working therein." The court, on these concessions, held that in the absence of evidence of intimidation, cooperation by workmen to improve their condition and increase their wages, and argument, reasoning and entreaty are lawful weapons, and says: "The tendency of modern thought and judicial decisions is to the enlargement of the right of combination, whether of capital or of labor. All restriction has not been removed; but I am not willing to hold that the combination which appears in this case, in itself, and apart from the methods used, is within the condemnation of the law as it is now interpreted by our courts. Irrespective of any statute, I think the law now permits workmen, at least within a limited territory, to combine together, and by peaceable means to seek any legitimate advantage, in their trade. The increase of wages is such an advantage. The right to combine involves of necessity the right to persuade all co-laborers to join in the combination. This right to persuade co-laborers involves the right to persuade new employees to join the combination." There may be cases however where persuasion and entreaty are not lawful instruments to effect the purposes of a strike. They may be used in such a manner and with such persistency as to constitute intimidation. Their use then becomes a violation of law.

¹ *Rogers v. Evarts*, 17 N. Y. Supp. 264; *Mogul Steamship Co. v. McGregor*, 23 Q. B. Div. 598; *Steamship v. McKenna*, 80 Fed. R. 48.

Authorities are quoted in respect to picketing¹ "that it was impossible to have an effectual system of picketing, without being guilty of that alarm and intimidation and obstruction which is a breach of law," and again that "the mere fact that no violence was used on the street is not conclusive, nor is it necessary that there should have been a direct threat." Jeering and shouting at employees by strikers may constitute intimidation; but the court concludes that no illegality has been shown sufficient to call¹ for the interference on its part.

The dividing line is now found in the proof of coercion either actual or by intimidation, and interference with the rights of others so as to prevent their free exercise. Even picketing members of the organization, where they may intercept other workmen on their way to and from work, and endeavor to persuade them to join the ranks of strikers, with offers to pay the expenses of employees as an inducement to leave their employment, has been held lawful, if peacefully conducted. Mr. Justice Barrett said in the *Kostka* case:² "They may even go to their brethren and beseech them not to work for less than the fixed rate." Mr. Justice Smith in *Roger v. Evarts* said: "In the case of no other

¹ See Wright on Crim. Consp. 89, and citation from opinion in *Druitt* case of *Bramwell*, B., 1867; *People v. Kostka*, 4 N. Y. Cr. 44; Ray Cont. L. 878, 888.

² 4 Crim. 484; 17 N. Y. Supp. 267; Ray Cont. Lim. 878.

In *Lucke v. Clothing Cutters' and Trimmers' Assembly No. 7, K. of L. of Baltimore*, decided by the Court of Appeals of Maryland in March, 1898, 26 Atl. R. 505, it was held that a labor organization which refuses to admit a non-union man to membership and informs his employers that in case he is any longer retained it will be compelled to notify all labor organizations of the city that their house is a non-union one, and thereby compels the discharge of such employee, is guilty of a wrongful act; and that an action will lie against it by him for the damages he has sustained in consequence of such a discharge.

In *Chipley v. Atkinson*, 28 Fla. 206; 1 South. Rep. 984, the court says: "From the authorities referred to, and upon principle, it is apparent that neither the fact that the term of service interrupted is not for a fixed period, nor the fact that there is not a right of action against the person who is induced or influenced to terminate the service or refuse to perform his agreement, is of itself a bar to an action against the third person maliciously and wantonly procuring the termination of, or a refusal to perform the agreement. It is a wrong on the part of the third party, to maliciously and wantonly procure the former to terminate or refuse to perform it. Such wanton and malicious interference for the mere purpose of injuring another is not the exercise of a legal right. Such other person, who is in an employment by which he is earning a living, or otherwise enjoying the fruit and advantages of his industry or enterprise or skill, has a right to pursue such employment undisturbed by mere malicious or wanton interference or annoyance. Every one has a perfect right to protect or advance his business if in so doing he infringes no superior legal right of another." In *Bowen v. Hall*, 6 Q. B. Div. 338, it was said by Brett, J. (Lord Sel-

contract does a man render himself liable as for tort by inducing violation by persuasion. I can see no reason why the contract service should be made an exception." Mr. Ray apparently takes the same view in his work on limitations of contracts. But persuasion and entreaty have their ordinary and natural limits, and when prohibited in extraordinary and mischievous ways, where they occasion molestation, and produce even with little apparent reason for it, intimidation without open violence, they pass the limits of peaceful conduct and fall within the condemnation, which in the great majority of cases of dissuasion from service in aid of a strike, the courts have visited upon over zealous and troublesome emissaries of strikers' organizations.

borne concurring): "That merely to persuade a person to break his contract is not be wrongful in law or fact, * * * but if the persuasion be used for an indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and fact a wrongful act and therefore a wrongful act, and therefore an actionable act, if injury results from it." The appellant, by the action of the appellee, lost his place in the month of February, and, although persistently in quest of a position, he did not succeed in obtaining work until the following April, when he secured employment with a merchant tailor at five dollars less per week than he was receiving when he was discharged. It would be strange, indeed, if the law, under such a state of facts as this record exhibits, provided no remedy. In *Winamore v. Greenback*, Willson, 100 N. Y. 100, it is said: "A special action in the case was introduced, for the reason that the law will never suffer an injury and a damage without a remedy." See, also, decision of Mr. Justice Ingraham, N. Y. Sup. Ct., Nov., 1898, *Sinsheimer v. United G. W.* where an injunction was granted against a trade circular.

CHAPTER XV.

RESPONSIBILITY FOR THE EXERCISE OF POLICE POWERS

There is an attendant responsibility or accountability for the exercise of police powers whenever committed to, or inherent in, local authority. No question arises as to the obligation to perform ministerial acts prescribed by law. Public officers may be compelled to exercise their functions, although they can never be required to determine, in a particular manner,¹ a matter committed to their discretion. A *quasi* public corporation may be forced to perform a public duty, and in some of the States private persons may, without showing any peculiar interest,² and without the intervention of the government law officers, prosecute to this end; but this extension of the right of action has not been always conceded.³

Where a public body is clothed by statute with power to do an act which the public interests require to be done, and the means for the performance are placed at its disposal, the execution of the power may be insisted on as a duty, although the statute conferring it may be only permissive in its terms.⁴ In the case of *Hardy v. The City of Brooklyn* a defense was sought under a provision of the charter exempting

¹ *People, ex rel. Francis, v. Common Council*, 78 N. Y. 39; *E. R. Gas Co. v. Donnelly*, 93 N. Y. 561; *People v. Supervisors*, 11 Abb. Pr. 114; *Entwistle v. Dent*, 1 Exch. 811; *City of Madison v. Smith*, 88 Md. 502; *People v. Supervisors*, 51 N. Y. 442.

² *Union Pac. R. R. v. Hall*, 91 U. S. 348; *King v. Railway Co.*, 2 B. & Ald. 644; *People v. Halsey*, 87 N. Y. 844; *Ottawa v. People*, 48 Ill. 238; *State v. Common Council*, 33 N. J. L., 110; see *Atty.-Gen. v. Earl of Lonsdale*, Eng. L. R., 7 Eq. 377, 390; *Regina v. Wycomber R. R. Co.*, 8 B. & S. 259, L. R., 2 Q. B. 310; *Cambridge v. Charlestown Co.*, 7 Metc. 70; *State v. Gorham*, 37 Me. 451.

³ *Atty.-Gen. v. Boston*, 123 Mass. 460, 479; *People, ex rel. Sherwood*, 129 N. Y. at p. 373; see *Wood on Nuisances*, § 740.

⁴ *Hutson v. The Mayor*, 9 N. Y. 163, 168; *Mayor v. Furze*, 3 Hill, 612; *Adsit v. Brady*, 4 Hill, 680; *Hardy v. Brooklyn*, 90 N. Y. 435; *Hogan v. Devlin*, 2 Daly, 184. Recusant officers may be compelled by mandamus to perform their official duty. *Littlefield, Atty.-Gen., v. Newell (Me.)*, 27 Atl. Rep. 110; *Baird v. Supervisors*, 138 N. Y. 95.

the city from liability for the misfeasance or nonfeasance of its officers, but it was held that this was not applicable to the failure to discharge a duty resting upon the city itself, and which it has not devolved upon any of its officers. The negligent construction of a sewer was complained of. It appeared that by the plan of the sewer as adopted and filed by the board of water commissioners, it ran past plaintiff's premises to a point where it would find a proper discharge. The sewer was constructed to a point a short distance above the plaintiff's premises, and then a wooden trough or shoot was built to carry off its contents, in consequence of which noxious and deadly gases were emitted, injuriously affecting plaintiff's premises. It was however held, that the omission to complete the sewer was not a mere exercise of discretion, but a neglect of duty, for which defendant was liable; also, that the fact that the disposition of the contents of the sewer by the currents and tides contributed to produce the injury, did not exempt the city from liability. And also, that the negligence complained of was in the prosecution of a lawful purpose within the scope of the authority of said board, and so was chargeable upon the city; and that a party who has caused an injury to another, by failing to perform a duty, cannot relieve himself from liability by showing that some cause arising out of such failure has contributed to produce the result complained of.

In *Ehrgott v. The Mayor* it is said that it is settled by a long line of decisions that "municipal corporations proper, having the powers ordinarily conferred upon them respecting streets within their limits, owe to the public the duty to keep them in a safe condition for use in the usual mode by travellers, and are liable in a civil action for special injury resulting from a neglect to perform this duty."

This duty extended to the territory annexed to the city from the county of Westchester, and although Park Commissioners were given by the law exclusive power to lay out, construct and maintain all public parks, streets, roads and avenues within the territory annexed, yet this is not exclusive of the city, but exclusive of any other officers of the city. "It is the duty of the city to keep its streets in repair, and that duty as to all the streets in the annexed territory is devolved upon the Park Commissioners. It is a duty which they discharge not for them-

¹ 96 N. Y. at p. 271; see *Hover v. Barkhoof*, 44 N. Y. 118; *Bryant v. Town of Randolph*, 133 N. Y. 70; *Parsons v. City of Manchester*, Sup. Ct. N. H., 27 Atl. R. 88; *Graham v. Boston*, 156 Mass. 75; *Bourget v. Cambridge*, 156 Mass. 391; *La Duke v. Township of Exeter (Mich.)*, 56 N. W. R. 851; *Page v. Bucksport*, 64 Me. 51; *Stickney v. Maidstone*, 30 Vt. 733.

selves, not for the public generally, but for the city. The duty is not taken away from the city. The city must act through officers and agents, and it is for the legislature to determine what powers and duties shall be devolved upon them. If they are provided by law, and authorized to discharge a corporate duty which rests upon the municipality, then, in the discharge of that duty, they represent the municipality, and it may be chargeable with their *misfeasance* and *nonfeasance*. To determine whether there is municipal responsibility, the inquiry must be whether the department whose misfeasance or nonfeasance is complained of, is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty, or charged with a duty primarily resting upon the municipality."

In *Bryant v. Town of Randolph*,¹ the New York Court of Appeals held that an individual who sustains an injury because of the *misfeasance* or *nonfeasance* of a public officer has a cause of action against such officer. Also, that under the law imposing upon the several towns of the State of New York "liability for any damages to persons or property, by reason of defective highways, in cases in which the highway commissioners would have been liable, the liability of the town is commensurate with that of its highway commissioners. Negligence on the part of a commissioner of highways may consist as well in the omission to erect barriers in dangerous places at the side of a highway, as in leaving the bed of the highway defective." It has been held however by some courts that no liability for failure to keep streets in

¹ 183 N. Y. 70; see also *Fitzpatrick v. Slocum*, 89 N. Y. 358; *Speir v. City of Brooklyn*, 189 N. Y. 6; 54 N. Y. St. R. 416. A large display of fireworks, including heavily-charged explosives, held at the junction of two narrow and completely built streets of a large city, and managed by private persons under no official responsibility, is an unreasonable and dangerous use of the streets, and a public nuisance. 19 N. Y. Supp. 665, affirmed. While a display of fire-works in a city street may be in fact a nuisance, the city cannot relieve itself of liability for damages caused by such a display, licensed by the mayor, or under the authority of an ordinance, on the ground that the ordinance is *ultra vires*, since the council admittedly, has regulating powers in the premises. *Detwiller v. Lansing*, 95 Mich. 484; *Reed v. Madison*, 83 Wis. 171; *Seymour v. Village of Salamanca*, 137 N. Y. 364.

² See 1 Russ. Cr. 357, 397; *Regina v. Heage*, 2 Q. B. 128; *Rex v. Clifton*, 5 T. R. 498; *Elliott R. & S.*, chap. 28; *Rex v. Gt. Broughton*, 5 Burr. 2700; *Wellington v. Wilson*, 14 Up. Can. C. P. 304; *Grassich v. Toronto*, 39 Up. Can. Q. B. 366; *Evans-ton v. Gunn*, 99 U. S. 660; *Hill v. Boston*, 123 Mass. 344; *O'Connor v. Pittsburg*, 18 Pa. St. 187; *Grove v. City of Ft. Wayne*, 45 Ind. 429; *Erie v. Schwingle*, 22 Pa. St. 384.

repair exists, unless it is expressly so provided by statute,¹ and this is such is the established law as to towns and even cities in the New England States.

In *Bieling v. City of Brooklyn* it was held² that, where a wooden awning over a city street is permitted, a duty devolves upon the municipal authorities to exercise reasonable diligence to see that it is adequately secured; and where an injury results from a defect of construction, which might have been ascertained by inspection, or from an accumulation of snow, permitted to remain upon the awning for such a length of time as to warrant the inference of notice to the city officials charged with the duty of keeping the streets in repair, the municipality is liable. It was also held that in the absence of evidence of personal negligence on the part of the Commissioner of Public Works he was not liable. In *Danaher's* case it was held in respect to a public well, that where wells are furnished and kept for public use by the city, it was undoubtedly the duty of the city to keep the wells and pumps in good order, and to keep the wells properly cleaned out, so that they would not become contaminated by any thing that might be thrown into them; but in this case there was no evidence of a failure or neglect of duty on the part of defendant. In *McCarthy v. City of Syracuse*,³ where the damage complained of was from a defective sewer, it was held the city could not escape responsibility simply because it had no notice that the sewer was out of repair. The obligation however extends only to the exercise of reasonable care and diligence, and there must be willful misconduct or culpable neglect to create liability.⁴

The underlying principle is the same as that which fixes upon the public authority liability for destruction of property by mobs, or in

¹ *Elliott R. & S.* 445; *Hill v. Boston*, 122 Mass. 344; *Burritt v. New Haven*, 42 Conn. 174; *Eastman v. Meredith*, 36 N. H. 284; *Morgan v. Hallowell*, 57 Me. 375; see *Clapper v. Waterford*, 181 N. Y. 382.

² 120 N. Y. 98; see *Danaher v. Brooklyn*, 119 N. Y. 241; 2 Dill. Mun. Corp., chap. 28; *Milnes v. Huddersfield*, 10 L. R., Q. B. Div. 124; 12 id. 448; *Hill v. Boston*, 122 Mass. 344.

³ 46 N. Y. 194. In some cases want of knowledge is negligence. *City of Abilene v. Cowperthwait*, Kansas Sup. Ct., Nov., 1893, 34 Pac. R. 795; *Boucher v. City of New Haven*, 40 Conn. 456.

⁴ *Danaher v. Brooklyn*, 119 N. Y. 254; *Hunt v. Mayor*, 109 N. Y. 184. As to the necessity of making tests and examinations of trees, bridges and wooden structures, see 119 N. Y. 255; *Vosper v. Mayor*, 17 J. & S. 296; *Howard v. Legg*, 11 N. E. R. 614; *Jones v. New Haven*, 34 Conn. 18; *Norristown v. Mayer*, 67 Pa. St. 535; *La Duke v. Township of Exeter* (Mich.), 56 N. W. R. 851.

consequence of riots. Vigilance and care in the protection and defense of the public welfare is required.¹ It was sought to be enforced in Danaher's case and Milne's case because of contamination in the water supply, and no exceptions are to be found thereby to the general rule of liability, where either *nonfeasance* or *misfeasance* can be shown, of which, evidence was wanting in these cases. In Milne's case the defects complained of were not in the public mains, but in the private service pipes, and no culpable negligence was found under the statute controlling the prosecution.

In *Clapper v. The Town of Waterford* funds had not been furnished to the commissioner of highways for repairs,² although he had demanded them. Indictments have been found, and public and private prosecutions have been maintained against Common Councils, Boards of Health and local authorities for creating, permitting, or refusing to abate nuisances within their particular provinces.³ In *People v. Corporation of Albany* it was held that an indictment lies against a corporation for neglecting to do what the common good requires when it possesses the requisite powers, and Mr. Justice Nelson, in his opinion, comments upon the principle involved as follows:⁴ "There can be no doubt the corporation have the legal power to remove the cause of

¹ See *Ely v. Supervisors*, 36 N. Y. 293; *Wolfe v. Supervisors of Richmond*, 11 Abb. Pr. 270; *Statute of Winchester*, 2 Co. Inst. 569; *Darlington v. Mayor*, 31 N. Y. 173, 188.

² The same defense would be difficult in the Croton water supply district of New York under the present legislation, and especially under the laws of New York State in 1898 conferring new powers upon the Department of Public Works of New York city. Thereby additional and special liability originates.

³ *State v. Turner*, 21 Mo. App. 324; *Com. v. Deerfield*, 6 Allen, 449; *Elliott R. & S.* 493; *Clows v. Staffordshire Potteries Co.*, 8 Ch. App. Cas. 125; *Spencer v. Lond. & B. R. Co.*, 8 Sim. 193; *Atty.-Gen. v. Castleford B. of H.*, 6 Ch. App. Cas. 854; *Gould Waters*, §§ 212, 233; *People v. Albany*, 11 Wend. 559; *Kiles v. City of Kansas*, 69 Mo. 102; 33 Am. Rep. 491; *Parker v. Mayor*, 39 Ga. 725; *Jones v. New Haven*, 34 Conn. 13; *Norristown v. Mayer*, 67 Pa. St. 356; *Cain v. Syracuse*, 95 N. Y. 83. In New York city, members of the Board of Aldermen were indicted in June, 1878, for granting a permit to obstruct the street with a stand, and the Commissioners of Health were at the same time indicted for neglect in the use of their powers to abate certain nuisances. These indictments were however dismissed under the somewhat peculiar circumstances of their origin, and in the latter case as without justification on the face of the proceedings. In Cain's case the prosecution was for a failure to exercise the power to compel by ordinance or resolution the demolition of a dangerous wall.

⁴ 11 Wend. 548; *Cohen v. The Mayor, etc., of New York*, 113 N. Y. 532; *Gould v. Rochester*, 105 N. Y. 46.

the nuisance complained of if that can be effected by deepening and cleansing the basin; and I apprehend it is impossible to distinguish reference to the subject in question between their power and their duty. The former constitutes a part of the mass of corporate powers which they have sought for the promotion of the public good, the execution of which is not at their option. They are bound to execute them when demanded by the public interest. The means put within their reach for the purpose are ample and exclusively within their control."

In *Cohen v. The Mayor, etc.*, it was held that where a municipal corporation without the pretense of authority, and in direct violation of a statute, assumes to grant to a private individual the right to obstruct one of its streets while in the transaction of his private business, and for such privilege takes compensation, it must be regarded as itself maintaining a nuisance so long as the obstruction is continued by reason of and under a license, and it is liable for damages naturally resulting therefrom to a third person. In this case a grocer's wagon when not in use was allowed to stand in front of his door, the thills were raised perpendicularly and held up with strings; a passing ice wagon struck the grocery wagon and turned it partially around, and the thills came down upon the sidewalk, striking plaintiff's intestate who was passing thereon, and caused his death, and the city was held liable.

In *Gould et al., as the Board of Health, etc., v. The City of Rochester*, it was held that while the Board of Health of a town may not summarily execute its orders as to the abatement of a nuisance by going outside of the boundaries of the town for that purpose, it may invoke the aid of the court for such purpose.

In *People v. Stocking*¹ it was held that "to constitute the crime of official corruption or misconduct in office, it is not essential that the board or officers should have jurisdiction of the subject upon which it or he acts. If the officer wickedly abuses or fraudulently exceeds his powers he is punishable by indictment. It is not essential that any injurious effects should result to individuals from the misconduct of the officer. If a board of supervisors acts without jurisdiction, the fact that the board exceeds its powers will constitute no defense for the supervisor whose act as such proceeded from corrupt and wicked motives."

¹ *People v. Stocking*, 50 Barb. 574; Wharton Am. Cr. L., § 2514; *People v. Coon*, 15 Wend. 277; *People v. Denton*, 2 Johns. Cas. 277.

Judge Kent's note to *People v. Denton*¹ is that "*every willful neglect of a public trust affecting the community is an offense at common law.*"

the statute had been totally silent as to the whole matter of this action, it cannot be doubted but that inspectors of election would have been indictable for a willful neglect, as well as for a corrupt execution of their office; because such conduct would be a public injury, and affect the whole community in its most essential rights. Weak and miserable would be that system of law and that administration of justice which would permit a public officer willfully to neglect his official duty, and not hold him responsible for a public offense."

It has been recently said² "the police power, the power to make laws to secure the comfort, convenience, peace and health of the community, is an extensive one, and in its exercise a very wide discretion as to what is needful or proper for that purpose is necessarily committed to the legislative body, in which the power to make such laws is vested. And again we are told that in a general way it may be said, public policy means the public good; any thing that tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel is against public policy. All the statutes and decisions relating to the exercise of the police power, to the incompatibility of certain officers, to the power of municipal authorities to enforce quarantine regulations, and many similar subjects rest on public policy."

Proceeding upon this definition, the Supreme Court of Pennsylvania, in *Goodyear v. Brown*, held that the Secretary of Internal Affairs was debarred by public policy from dealing with his own department, by receiving and granting his own application for a land warrant, and finally causing a patent to issue to himself. The court further held "that a warrant so issued to the Deputy Secretary of Internal Affairs confers no title as against a claimant under an older

¹ 2 Johns. Cases, note c, p. 277; 1 Hawk. C. C. 66, 1, 2; 4 Blackst. Com. 140.

² *Ex parte Whitwell*, Sup. Ct. Cal., April 1, 1898, 82 Pac. R. 870; *Ex parte Tuttle*, 91 Cal. 589; *Goodyear v. Brown*, 155 Pa. St. 514. This extension of public policy has gone so far in the Province of Canada that it would seem new rights and church privileges are involved. Prineau recovers \$20 damages and \$200 costs against the warden of Notre Dame Cathedral, Montreal, because the latter passed him by without handing the collection plate, 33 Alb. L. J. 200; 47 id. 42-5-6; and in *Dunnott v. Formeri*, 2 Grant, 199, the right to participate in the sacraments of the church is the subject of discussion.

survey, and that it is immaterial, in such a case, that there is no statute forbidding the Secretary or his deputy to so deal with the department.

Where the question is of duty under the positive terms of a statute either mandatory or prohibitory, it is no defense that the accused acted in good faith and under legal advice.¹ On the one side neglect of duty is, as Sergeant Hawkins said, a violation of the "condition implied by common reason in the grant of every office; that the grantee ought to execute it diligently and faithfully, since every office is instituted, not for the sake of the officer, but for the good of some others." On the other hand, a mistake of law does not excuse the doing of a prohibited act, and when a prohibition is necessarily implied by the language of the law, the act involved is a misdemeanor, irrespective of the motive or intent. The transgression or excessive use of authority, we have already seen, is contrary to this regard of the public welfare, of which the courts affirm that not even the legislature is the exclusive judge.² In *Forster v. Scott*, the Court of Appeals of New York³ said, "although the police and other powers of government may sometimes incidentally affect property rights, these powers can only be exercised to promote the public good, and are always subject to judicial scrutiny."

Another caution appears, as stated in the opinion of the Supreme Court of Missouri, in *St. Louis v. Webber*,⁴ "In assuming however the right to judge of the reasonableness of the exercise of corporate power, courts will not look closely into mere matters of judgment where there may be a reasonable difference of opinion. It is not to be expected that every power will always be exercised with the highest discretion, and when it is plainly granted, a clear case should be made to authorize an interference on the ground of unreasonableness." In *People v. Jones*, the Supreme Court of New York held that "commissioners cannot be coerced in the exercise of their discretion by mandamus or otherwise, and for mere mistake they are not liable, either civilly or criminally. But for an unlawful and corrupt exercise of the

¹ Note *b*, *People v. Denton*, 2 Johns. Cases, 277; *Gardner v. The People*, 62 N. Y. 299; *People v. Brooks*, 1 Den. 457.

² *Ex parte Whitwell*, *supra*; *Tiedeman Con. Lim.* 85, 194; *Mugler v. Kansas*, 123 U. S. 661; *In re Jacobs*, 98 N. Y. 108; see *Stoddard v. Village of Saratoga Springs*, 127 N. Y. 261.

³ 136 N. Y. 577; *Proprietors of Mt. Hope Cemetery v. City of Boston, Mass.* Sup. Jud. Court, April 8, 1893, 33 N. E. R. 695; 47 Alb. L. J. 438; *Scovill v. McMahon*, 62 Conn. 378; *Hill v. Mayor*, 139 N. Y. 495.

⁴ 44 Mo. 547.

powers vested in them they are answerable criminally." For an error of judgment in matters lawfully committed to them, public officers are not answerable.

Ministerial officers can only be made liable to an individual, for damages caused by an alleged nonfeasance, upon proof showing an omission on their part to perform a plain duty devolved upon them by law. In the exercise of discretionary and legislative powers there is no liability.¹ In a recent case however, where a board of supervisors, having the right to exercise their discretion in the matter of the division of a county into assembly districts, made a palpably unjust and unreasonable decision, as the Court of Appeals of New York found, this court held that the decision was for such reasons to be held as unconstitutional, and "as though no decision was made, and mandamus will lie at the suit of electors of the county to compel the board to perform its duty."

So far the consideration has been of the responsibility for misfeasance or nonfeasance, when the question of fault or of wrong is presented. There is, as we have previously seen, the protection of the common law, and of overruling necessity, for many acts which would otherwise have been trespass, and no compensation is provided to the owner when property is destroyed or taken for the public good,² but not for public use, as when houses are razed or bulwarks constructed to prevent the ravages of fire or flood. Undoubtedly an excessive use of such necessary privileges, or an unreasonable and willful claim, or exercise of such rights, might be the foundation of actions for damages, and for this reason in order that there should be no perilous hesitation, and reluctance, to assume risks in the treatment of private property in times of emergency, in several States statutes were passed for the relief of owners of property destroyed. These have been held in derogation of the common law and strictly construed in favor of the public.³

¹ *People v. Jones*, 54 Barb. 811; *Freeman v. Cornwall*, 10 Johns. 470; *Fitzpatrick v. Slocum*, 89 N. Y. 358; and see *People v. Lorillard*, 135 N. Y. 285; *People v. Rice*, 135 N. Y. 478; *Dill. Mun. Corp.*, chap. 23; see, however, limitation in *Morton v. Mayor, etc.*, 140 N. Y. 207.

² *People, ex rel. Baird, v. Board of Supervisors of Kings County*, 138 N. Y. 95; *Littlefield, Atty.-Gen., v. Newell (Me.)*, 27 Atl. R. 110.

³ Ch. IV and note 1, p. 55; *Mills Em. Dom.*, §§ 4 and 5; *Elliott R. & S.* 8, 9; *Stone v. Mayor*, 25 Wend. 157; *McDonald v. Red Wing*, 18 Miss. 38; *Taylor v. Plymouth*, 8 Metc. 462; *Scovill v. McMahon*, 62 Conn. 378.

⁴ *Mills Em. Dom.*, § 5; *Mayor v. Lord*, 18 Wend. 126; *Hill v. Mayor, etc.*, N. Y., 139 N. Y. 495.

But other questions arise. In respect to municipal corporations the general rule¹ is, that they cannot be held liable for the exercise of powers administered exclusively for public purposes, without private or pecuniary benefit, when negligence or fault is not shown. This is said to be the common-law rule in respect to *quasi* municipal corporations, such as counties, townships and school districts. The obligation and duty of a municipal corporation extends only to the exercise of reasonable care and vigilance, is a doctrine often repeated, and to create liability, willful misconduct or culpable neglect must be proven.² In *Danaher's* case the complaint was occasioned by polluted water from a public well. In *Milne's* case, water had been poisoned by the service pipes, though it was pure in the public mains. In *Jenney's* case, a hydrant had been forced out, either by the pressure of the water or by some active power above the surface, and a stream gushing out had overflowed plaintiff's oil works. In *Hill v. Boston*, a child attending a public school, in a school-house provided by the city, under the duty imposed upon it by general laws, suffered injury by reason of the unsafe condition of a staircase in the building, over which he was passing. In *Hunt v. The Mayor*, the plaintiff was injured by an explosion of one of the manholes of a steam-heating company in one of the streets of New York. The court, in its opinion, distinguishes the facts on which it rests from those of many cases discussed in its consideration.

In the case of *Maximilian v. The Mayor, etc., of New York*, the negligence of the driver of an ambulance wagon belonging to the city, employed by the Commissioners of Public Charities, caused the death of plaintiff intestate.³ The rule to be followed was so care-

¹ See opinion of Hand, Senator, in *Bailey v. Mayor*, 3 Hill, 430; *Dill. Mun. Corp.*, chap. 28; *Hill v. Boston*, 123 Mass. 344; *Snider v. City of St. Paul*, 58 N. W. R. 768; *Jenney v. City of Brooklyn*, 120 N. Y. 164, 167; *Alliance v. Joyce*, 49 Ohio, 7.

² *Hunt v. Mayor*, 109 N. Y. 134; *Jenney v. City of Brooklyn*, 120 N. Y. 184, and authorities cited *supra*; see, however, *Barnes v. District of Columbia*, 91 U. S. 540, that a municipal corporation, holding a voluntary charter as a city or village, is responsible for mere negligence in the care and maintenance of its streets. *Aldrich v. Cheshire Co.*, 21 N. H. 359; 53 Am. Dec. 212; *Am. Print W. v. Lawrence*, 3 Zab. 590; S. C., 57 Am. Dec. 420; *Cooley Torts*, 376; *Elliott R. & S.* 506, 507; *Howland v. Inhab. of Maynard, Mass. Sup. Ct.*, July 14, 1893, 34 N. E. R. 515.

³ *Maximilian v. Mayor*, 62 N. Y. 160, 164, *seq.*; *Eastman v. Meredith*, 36 N. H. 284; *Fisher v. Boston*, 104 Mass. 87; *Hafford v. New Bedford*, 16 Gray, 297; *Oliver v. Worcester*, 102 Mass. 489; *Gillespie v. City of Lincoln*, 85 Neb. 34; *Bryant v. City of St. Paul*, 33 Minn. 289; see citation in the opinion in *Kansas City v. Lemen*, and discussion of cases, 57 Fed. R. 905; *Culver v. City of Streator*, 180 Ill. 238; *Harmon v. City of St. Louis*, 62 Mo. 318; *Dill. Mun. Corp.*, §§ 966, 975; *Caldwell v. City of*

fully stated by the court of last resort that it has since stood as an authority in the State of New York, governing its class. The duties imposed upon a municipal corporation are divided; "one is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public, and is used for public purposes. The former is not held by the municipality as one of the divisions of the State; the latter is. In the exercise of the former power, and under the duty to the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for a failure to use its power well, or for an injury caused by using it badly. But where the power is intrusted to it as one of the political divisions of the State, and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for *nonuser*, nor for *misuser*, by the public agents."

"Where the duties which are imposed upon municipalities are of the latter class, they are generally to be performed by officers, who though deriving their appointment from the corporation itself, through the nomination of some of its executive agents, by a power devolved thereon, as a convenient mode of exercising a function of government, are yet the officers and hence the servants of the public at large. They are not, then, the agents or servants of the municipal corporation, but are public officers, agents, or servants of the public at large, and the corporation is not responsible for their acts or omissions, nor for the acts and omissions of the subordinates by them appointed. And where a municipal corporation elects or appoints an officer in obedience to an act of the legislature, to perform a public service in which the corporation has no private interest and in which it derives no special benefit or advantage in its corporate capacity, such officer cannot be regarded as agent of the municipality for whose negligence or want of skill it can be held liable." Where the duty is upon the city itself, and "not

Boone, 51 Iowa, 687; Elliott v. Phila., 75 Pa. St. 347; Trammell v. Russellville, 34 Ark. 105; Little v. City of Madison, 49 Wis. 605. "Legislative authority to do acts which between individuals would be regarded as a nuisance must be express or clearly implied from powers conferred, in order to relieve the corporation from liability in damages." Morton v. Mayor, etc., 140 N. Y. 207.

upon public officers appointed by it, where it accepts the duty and the power to perform it, and itself by its own agents sets about the work or undertakes to set about it by its own agents, then, for a negligent omission to do, or for doing in a negligent way, it may be liable."

In *Benner v. Atlantic Dredging Company*, the plaintiffs' boats were three thousand feet away from Hellgate, where officers of the United States were blasting rocks in the improvement of the channel, was injured, but the court held that the work was lawful, done under the government for the government, and in no sense to the detriment of public rights or to the advantage of defendant's private ownership, and the defendant was not liable. The opinion adds, "criticism with respect to the extent to which private and municipal corporations have been permitted to expand the authority given them by the government to justify the invasion of private rights, may be pertinent when such parties attempt the expansion for such purposes, but it can have no pertinency to a case where the government itself seeks by appropriate means, plainly adapted to the end, to accomplish for the public benefit any of the objects confided to its jurisdiction."

In *Barnes v. District of Columbia*, the United States Supreme Court says: "It is denied that a municipal corporation as distinguished from a corporation organized for private gain, is liable to an individual for an injury arising from negligence in the construction of a work organized by it. The authorities establishing the contrary doctrine, that a city is responsible for mere negligence, are so numerous and so well considered that the law must be deemed to be settled in accordance with them." The distinction is noted between the liability of a municipal corporation, made such by the acceptance of a charter, and the involuntary *quasi* corporations, such as counties, towns, townships and school districts. "The liability of the former is greater than the latter. The latter are auxiliaries of the State merely, and when corporations, are of the lowest grade, and invested with the smallest amount of power. Whether this distinction¹ is based upon sound principle or not

¹ *Jones v. New Haven*, 84 Conn. 1; *Bailey v. Mayor*, 2 Denio, 483; *Conrad v. Ithaca*, 16 N. Y. 153; *Snider v. St. Paul*, *supra*; *Hardy v. City of Brooklyn*, 90 N. Y. at p. 439.

² 134 N. Y. 156; *Cogswell v. N. Y., N. H. & H. R. R.*, 103 N. Y. 10; *Seifert v. City of Brooklyn*, 101 N. Y. 136; *Barnes v. District of Columbia*, 91 U. S. 540; *Child v. City of Boston*, 4 Allen, 41; *City of Detroit v. Blackely*, 21 Mich. 84; *Mersey Docks v. Gibbs*; *Same v. Penhollow*, 1 H. L. Cases (N. S.), p. 93.

³ An example is given in the cases of *Ithaca v. Brockport*, 16 N. Y. 153; *id.* 163; *Russell v. Men of Devon*, 2 T. R. 308; 1 Dill. Man. Corp., §§ 10, 13; 2 *id.* 761. In *How-*

it is so well settled that it cannot be disturbed. Decisions or analogies derived from this source are of little value in fixing the liability of a city or village. This case also shows that the Board of Public Works of the municipality is not an independent body acting for itself.

A somewhat different relation of a subordinate board to the central government of a city is considered in the Maximilian case, *supra*, and also in *Tormey v. The Mayor*¹ of New York, where a demurrer had been interposed on the ground that the complaint did not state facts sufficient to constitute a cause of action. The allegations were that the Board of Health was a department of a corporation, and from it the said municipal corporation received and derived a personal and pecuniary benefit; that the Board of Health falsely claiming the plaintiff was sick of small-pox took her from her house and family, placed her in a wagon used for the transportation of small-pox patients, and removed her to Bellevue Hospital, without any proper medical examination.

Afterward, "although her disease was discovered to be measles, she was without justification sent to another hospital at Blackwell's Island, and through the negligence and brutality of the defendant's employees she was exposed to suffering and danger, deprived of proper medicine and attendance, and greatly injured." The court held that, "although where a board or department of a city government is created by legislative enactment, and is not subject to the control or direction of the city government, the latter deriving no pecuniary benefit from the existence of the former, the city government is not responsible for damages occasioned by the negligence and malfeasance of the former; yet where the city does derive a benefit from the existence of the board, and its employees participate in the wrong, by which the injury is occasioned, it is liable therefor." The opinion adds that these allegations are admitted by the demurrer, and that "such wrongs if they existed as described should be punished criminally as well as civilly redressed." Judgment was therefore ordered upon the demurrer, with leave to the defendant to withdraw the demurrer and answer.

The general rule is firmly established that public officers are not responsible for nonfeasance, or even as stated by Mr. Justice Balcom in

land v. Inhabitants of Town of Maynard, the Supreme Court of Massachusetts declined to consider whether a town can be guilty of malice and rejected the authority of English and Canadian cases in tort against a town. Also held an action for libel will not lie against town for publication of matter in a report of committee, July 14, 1898. 84 N. E. R. 501. Classification of villages, *Costello v. Wyoming*, 49 Ohio St. 202.

¹ 12 Hun, 542.

Murphy v. Commissioners,¹ for positive wrongs of the sub-agents or servants properly employed by and under them in the discharge of their official duties, but the position is distinguishable, where the corporation is acting in a private or proprietary capacity, or for its own advantage, and receiving a pecuniary benefit, from that it occupies when representing solely the interests of the community at large. In Snider v. St. Paul, the Supreme Court of Minnesota points out that the municipality may own, and use, water-works and gas-houses, and by recent legislation in South Carolina, the State has assumed the sale of liquors as has been the course of other governments in several branches of trade. In the one case when acting for the public interest no private action lies; in the other there is a common-law liability for negligence.²

"The distinction is well established between the responsibilities of towns and cities for acts done in their public capacity, in the discharge of duties imposed upon them by the legislature for the public benefit, and for acts done in what may be called their private character, in the management of property and rights voluntarily held by them for their own immediate profit and advantage, as a corporation, although inuring of course ultimately to the benefit of the public," is said by the Massachusetts Supreme Court in Oliver v. Worcester, and it expresses the generally accepted view, upon which the line of responsibility is drawn in many cases, where it has been claimed the doctrine of *respondet superior* should apply. It is but an extension of this rule which led the New York Court of Appeals to attach the liability of a creator of a nuisance as found in Irvine v. Wood, to the city of New York,³ and in Cohen v. The Mayor, because in both cases the defendant's action was without the sanction of a public law.

The case of Seifert v. The City of Brooklyn goes a step further, in fixing the limits of responsibility in the exercise of municipal authority, in some directions of public work. There it was held that a municipal corporation has no right in the exercise of its power to

¹ 28 N. Y. at p. 146; Story Agency, § 319.

² Bailey v. Mayor, 3 Hill, 531; 2 Dill. Mun. Corp. 875; O'Meara v. The Mayor, 1 Daly, 425; Oliver v. Worcester, 102 Mass. 489; Detroit v. Cory, 9 Mich. 165; Biglow v. Randolph, 14 Gray, 544; Eastman v. Meredith, 36 N. H. 284; Murphy v. Comrs., 28 N. Y. 142.

³ Irvine v. Wood, 51 N. Y. 224; Cohen v. Mayor, 140 N. Y. 537; Seifert v. City of Brooklyn, 101 N. Y. 136; Dill. Mun. Corp. (4th ed.), chap. 23, § 17; Constitution Wharf v. Boston, 156 Mass. 397; Morton v. Mayor, 140 N. Y. 207; Hill v. Mayor, 139 N. Y. 495.

determine when, where and how to make improvements, to do so upon a plan, which substantially involves the appropriation by it, of the property of a citizen to a public use, without making compensation therefor. Where the exercise of a judicial or discretionary power by a municipal corporation results in a direct and physical injury to the property of an individual, which from its nature is liable to be repeated and continuous, but is remediable by a change of plan and the adoption of prudential measures, the corporation is liable for such damages as occur in consequence of its continuance of the original cause after notice, and an omission to adopt measures to remedy the evil. The rule that a municipal corporation acting under the authority of a statute cannot be subjected to a liability for damages arising from the exercise by it of the authority so conferred, is confined to such consequences as are the necessary and usual result of the proper exercise of the authority. It does not shield the corporation where injury results solely from the defective manner in which the authority was originally exercised, and from continuance in wrong after notice of the injury."

This was a case where the city officers adopted a plan of sewerage which was a matter of public concern, called for by the health and safety of the people at large, and the commissioners of sewage and drainage acted *quasi* judicially and as public officers. Their main sewer was proved by use to be insufficient, and sewage was forced through the manholes, and upon plaintiff's premises, inflicting serious injury. These inundations increased in frequency as new lateral sewers were connected with the main trunk. For these damages it was held the city was liable, and also that, "while the corporation was under no original obligation to the plaintiff or other citizens, to build a sewer at the time and in the manner it did, yet having exercised the power to do so, and thereby created a private nuisance on his premises, it incurred a duty, having created the necessity for its exercise, and having the power to perform it, of adopting and executing such measures as should abate the nuisance and obviate damage." Other authorities lead to the conclusion that generally where the injury is occasioned by the plan of improvement as distinguished from the mode of carrying the plan into effect there is no liability, or as in *Hill v. Boston* or *Milnes v. Haddersfield*, where the difficulty is found in the

¹ *Byrnes v. Cohoes*, 67 N. Y. 204; *Phinizy v. Augusta*, 47 Ga. 260; *Radcliff Exrs. v. Mayor*, 4 N. Y. 195; *Franklyn Wharf Co. v. Portland*, 67 Me. 46; *Haskell v. New Bedford*, 108 Mass. 208; but see *Dill. Mun. Corp.*, § 1051; *Jacksonville v. Doan*, 145 Ill. 23.

care or use of public works, the municipality erecting them is not responsible.

Such was the result in *Watson v. City of Kingston*,¹ where the grade of a street having been duly established by the defendant, it was cut along the side of a hill, and a dry wall was laid to carry the street up to the grade in front of the plaintiff's premises, which were on the lower side of the street. The owner of abutting property was given the privilege of constructing a wall of masonry, but refused to avail herself of the privilege, or to pay for cement in which to lay the wall. Subsequently water came down the gutter on the lower side of the street, and passed through the gutter and wall on to these premises, causing damage. It did not appear that said premises were subjected to any further burden, in reference to surface water, than they were required to bear when in a natural state. It was held, that the defendant was not liable; that, in "establishing the grade and adopting plans for the improvement of the street, the common council acted judicially and in the exercise of discretionary power vested in it, and for such acts an action would not lie; also that the action could not be sustained upon the theory of negligent construction of the wall. The ordinances required the sidewalks, curbs and gutters to be constructed by the abutting owners or occupants. The owner had constructed the gutter in front of these premises with cobble-stones, instead of flat stones, as contemplated by the ordinance, and the water flowed through between the cobble stones, and thence through the wall. In the absence of proof that defendant's officers or agents had interfered with the gutter after it was laid, the owner and not the defendant was responsible for the improper construction of the gutter."

On the general principles above referred to, it has been held, that Commissioners of Emigration were not liable for the negligence of their agent in the loss of baggage of an emigrant, or the postmaster-general for loss in the mails.²

In like manner, pollution from street drainage was held not actionable, and a tendency to injure the water supply, where no actual injury resulting from it was shown, was held insufficient foundation for a

¹ *Watson v. Kingston*, 114 N. Y. 88; *Urquhart v. City of Ogdensburg*, 91 N. Y. 67; *Rauenstein v. N. Y., L. & W. R. R.*, 136 N. Y. 528; *Atwater v. Trustees of the Village of Canandaigua*, 124 N. Y. 602. When statute is remedial, see *U. S. v. Alexander*, 149 U. S. 186.

² *Murphy v. Connelly*, 28 N. Y. 142; *Whitfield v. Le Depew, Cowp.* 242.

bill.' In *Bryant v. The City of St. Paul*, the city was held not liable for the negligence of its Board of Health in the discharge of its duties,¹ which were public and governmental and not corporate in their character; and the same city was absolved from responsibility for negligent acts of members of its Fire Department. In *Gillespie v. City of Lincoln*, where plaintiff's intestate was struck and killed by a ladder wagon belonging to the Fire Department of the defendant, through the negligence of the driver, a member of the department, while driving along one of the public streets to exercise a team of horses belonging to the department, the city was held not liable. Similar decisions were rendered in *Hafford v. The City of New Bedford*, regarding injuries occasioned by the negligence of members of the Fire Department of the city, and in *Mead v. New Haven*, where the complaint was of an inspector of steam boilers. In *McKay v. Buffalo*, the plaintiff was injured by the careless use of a pistol by a policeman, who was seeking to kill a mad dog, and in *Buttrick v. City of Lowell*, an assault and battery was committed by a police officer of the city, in an attempt to enforce a city ordinance, but the city was not made responsible.² In *Brown v. Vinalhaven*, *Richmond v. Long*, and *Sherburn v. Yuba*, damages were sustained by the negligence and fault of physicians and attendants in hospitals maintained by the municipality, but no relief therefor was obtained.

These cases followed the rule applied both to municipalities and to the county, that public officers of the government, in the performance of their public functions, are not liable for the misconduct, negligence or omission of their official subordinates. On the other hand, where a municipal corporation, acting through its officers, in the execution of a power conferred upon it to collect a tax assessed upon a particular

¹ *Barnard v. Newton*, 154 Mass. 255; *State, ex rel. Bd. H. Hackensack, v. Bd. Chosen Freeholders of Bergen*, 46 N. J. Eq. 173; *Bd. of H. v. N. Y. & M. Co.*, 47 N. J. Eq. 1.

² *Bryant v. St. Paul*, 33 Minn. 289, and 23 N. W. R. 220; *Gruber v. St. Paul*, 34 Minn. 402, and 26 N. W. R. 228; *Gillespie v. City of Lincoln*, Neb. Sup. Ct., June 11, 1892, 35 Neb. 84; *Hafford v. New Bedford*, 83 Mass. 297; *Fisher v. Boston*, 104 Mass. 87; *Mead v. New Haven*, 40 Conn. 72; *Dodge v. Granger*, 24 Atl. R. 100; *Haight v. Mayor*, 24 Fed. R. 98; *Condict v. Jersey City*, 46 N. J. L. 157; *Burrill v. Augusta*, 78 Me. 118; *Elliott v. Phila.*, 75 Pa. St. 347.

⁴ *Parsons v. City of Manchester (N. H.)*, 27 Atl. R. 88; *McKay v. Buffalo*, 9 Hun. 402; *Buttrick v. Lowell*, 83 Mass. 172; *Brown v. Inhabitants of Vinalhaven*, 65 Me. 402; *Richmond v. Long*, 17 Grattan, 375; *Sherburn v. Yuba*, 21 Cal. 113; *Hill v. Boston*, 122 Mass. 344; *Dill. Mun. Corp. chap. 23*; *Jenney v. Brooklyn*, 120 N. Y. 164; *Everson v. City of Syracuse*, 100 N. Y. 577; *Mayor of Baltimore v. War*, 27 Atl. R. 85; *Baird v. Supervisors*, 138 N. Y. 95.

citizen, enforced its collection out of the property of another, in no wise liable therefor, and appropriated the proceeds of the collection to its own use, with full knowledge of the illegality of the proceeding, it was held liable to the owner for the spoliation of his property.¹

When a private corporation is clothed with a portion of the State's sovereign rights for the performance of a public duty, in a business of a public character, and to meet a public necessity, the legislative authorization exempts it from liability for consequential damages, if the corporation proceeds within its jurisdiction, and with care and skill;² but an exception has been made when a nuisance is created to the injury of a private citizen, from whose claim for special inconvenience and discomfort, not experienced by the public at large, immunity is not given. Having accepted a public franchise, the duty connected with it must be performed if necessary to the public use and convenience.³ As was said in *People v. Albany and Vermont Railroad*, a corporation owes a duty to the public to exercise the franchise granted to it, and it cannot abandon a portion of its road and incur a forfeiture at its mere pleasure. The remedy is by mandamus or indictment, or at the election of the State, proceedings to annul the corporation. It cannot cease to exist of its own will.⁴ With equal justice, the corporation may be entitled to a writ of mandamus to compel the Commissioner of Public Works to issue a permit for its assistance, and has the protection of the statute against claims for damages.⁵

The personal responsibility of public officers remains to be considered. It differs widely from that of private agents, for the nature and scope

¹ *Teal v. City of Syracuse*, 120 N. Y. 184; *Howell v. City of Buffalo*, 15 N. Y. 512; *Nichols v. City of Boston*, 98 Mass. 39.

² *Bohan v. P. J. G. L. Co.*, 122 N. Y. 26; *Atwater v. Trustees*, 124 N. Y. 602; *Hill v. Managers of Met. Asy. Dist.*, L. R., 4 Q. B. 433; L. R., 6 App. Cases, 193; *Com. v. Kidder*, 107 Mass. 188; *B. & P. R. R. v. Fifth Bapt. Ch.*, 108 U. S. 317.

³ *Elliott R. & S.* 32, 33; *Regina v. Eastern Counties R. Co.*, 10 A. & E. 351; *Rex v. Kerrison*, 3 M. & S. 526; *Regina v. Wycomber*, 8 B. & S. 259; *People v. Chicago*, 67 Ill. 118; *People v. Albany & Vermont R. R.*, 24 N. Y. 261; *Mayor v. Dry Dock, E. B. & B. R. R.*, 133 N. Y. 104.

⁴ *People v. Ballard*, 134 N. Y. 269; see *Central Trans. Co. v. Pullman P. C. Co.*, 139 U. S. 24. The contrast of such obligations with those which do not affect the public is to be seen in *Skinner v. Smith*, 134 N. Y. 240, where it is held a manufacturing corporation may discontinue its operations when unprofitable, and that stockholders may be denied equitable relief when they have assented to acts which, although *ultra vires*, are not *per se* illegal or *mala prohibita*.

⁵ *Matter of Petition of Third Avenue R. R.*, 121 N. Y. 536; *Rauenstein v. N. Y., L. & W. R. R.*, 136 N. Y. 528.

of the authority and the duty can be ascertained from the public records in the former case, and one who deals with a public officer has the means of knowledge open to him. In matters of contract, a personal liability exists only where there is some element of fraud or some culpable wrong on the officer's part. Although he may be guilty of a breach of duty, subjecting him to a prosecution for a criminal offense, or subjecting him to a civil action by the representatives of the government, he may not be liable to an individual. To give a right of action for such a cause, the plaintiff must show a breach of duty imposed by the statute; that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. "It is enough however if he shows such facts as enable the courts, by an application of legal principles, to infer the duty and a special injury from its wrongful breach."¹

Where the duties are purely discretionary, an officer is not liable to one who suffers injury from a failure to exercise them, nor is he liable where there is nothing more than a mere error of judgment, for an injury caused in the discharge of discretionary duties, where he acts in good faith, and keeps within the scope of his authority. But where an officer attempts the performance of a ministerial duty which he knows, or which he ought to know, requires peculiar skill and knowledge, he may be liable to one who suffers a special injury because the work is constructed unskillfully and improperly. In such a case the better rule is that stated by an English author, is said in *Elliott on Roads and Streets*,² that, "Public officers, whether their duties are of a general public nature or of a *quasi* public nature (that is, who act upon request of individuals for rewards), are liable for negligence, and are not protected merely because they act *bona fide*, and to the best of their skill and judgment, but they are bound to conduct themselves in a skillful manner."

"It is often difficult to determine whether a duty is discretionary or imperative, and no other rule can be safely laid down than the fundamental one that the nature of the duty is to be determined from the statute creating it. The character of the act itself, it has been said, will naturally determine whether it be judicial or ministerial. If it be the execution of a determination committed by law to the judgment

¹ *Elliott R. & S.* 502-507; *Strong v. Campbell*, 11 Barb. 185; *Moss v. Cumming*, 44 Mich. 359.

² *Elliott R. & S.* 505, and notes 1 and 2; *Wilson v. Mayor*, 1 Denio, 599; *Ferguson v. Earl of Kinoul*, 9 Cl. & F. 250; *Brayser v. MacLean*, L. R., 66 C. P. 398.

and discretion of an officer, which could as well be done by another as by the one clothed with the powers of determination, it is a ministerial act. The fact that it requires skill and involves judgment and discretion will not give it a judicial character."

"The current of judicial thought," our author continues,¹ "strongly favors the doctrine that authority conferred upon a public officer, accompanied with the means of enabling him to exercise it, creates a duty which one who has a special beneficial interest in the performance of the duties, may vindicate by a private action." It seems, says the New York Court of Appeals, in *Bassett v. Fish*,² that "as a general rule where an administrative officer acts contrary to, or neglects to act in accordance with his official duty, and another suffers injury in consequence, an action lies against the officer on behalf of the person so injured," and in *Hover v. Barkhoof* the same court said "the principle should be regarded as settled in this State, that public officers, whose duties are not judicial, are answerable in damages to any one specially injured by their careless and negligent performance of, or omission to perform, the duties of their office." This is the doctrine of *Bryant v. The Town of Randolph*. "An individual who sustains an injury because of the misfeasance or nonfeasance of a public officer, has a cause of action against such officer."

It was held in *People, ex rel. Derby, v. Rice*, that "a writ of mandamus may be granted to compel ministerial officers to exercise their functions, where a specific duty has been imposed upon them by law and they refuse to perform it, or do not conform to the law, or when some legal right has been refused by them," and in *People, ex rel. Daley, v. Rice*, that "any citizen may invoke the aid of the courts to compel the performance by a public officer of a public duty; and so an elector may, at least in the case of the death of the candidate interested, make application to the proper tribunal for a mandamus, to compel the State Board of Canvassers to reject and disregard a paper purporting to be a return of a board of canvassers, but which is not properly

¹ Elliott R. & S. 506, notes; *McCord v. High*, 24 Iowa, 336; *People v. Supervisors*, 11 Abb. Pr. 111; *Mason v. Fearing*, 9 How. 248; *Supervisors v. U. S.*, 4 Wall. 425; *Cooley Torts*, 376. The facts constituting the duty should be pleaded. *Butler v. State*, 17 Ind. 450.

² *Bassett v. Fish*, 75 N. Y. 303; *People, ex rel. Daley, v. Rice*, 129 N. Y. 449; *People, ex rel. Derby, v. Rice*, id. 461; *Bryant v. Town of Randolph*, 133 N. Y. 70; *Cavanaugh v. Durgin*, 156 Mass. 466. Liability of assessors in trespass. *Gordon v. Becker*, 54 N. Y. St. R. 781.

signed and certified, and does not give the results of a proper legal canvass, and to consider only a proper return."

The question of duty is often dependent upon the construction to be given to the words of a statute. There has therefore been considerable attention given to the use of the words *shall* and *may*, and it has been held that the word *may* means *must* and *shall*, only in cases where the public interest and rights are concerned, and where the public and third persons have a claim *de jure* that the power shall be exercised.¹ A considerable discussion upon this topic is to be found in the recent cases in the New York Court of Appeals.² In *Gilmore v. City of Utica* Mr. Justice Earl, in the opinion of the court, reviews many authorities and says: "Generally permissive words used in statutes conferring power and authority upon public officers or bodies will be held mandatory where the act authorized to be done concerns the public interest or the rights of individuals. There must be a definite, plain public interest or a vested well-defined private right, and then it will very justly be supposed that the legislature meant to subserve or protect the public interest, or to give or secure the private right.

In *Newburgh Turnpike Company* case Chancellor Kent held the act left it to the discretion of the company to remove a gate or not, and quotes with approval Lord Hardwicke's observation, that "the words *shall* or *may*, when applied to private trusts, leave an election to the trustees, which is not the case where the words are used in acts of Parliament. In *People v. Lorillard* the court says that "a constitu-

¹ See discussion of cases in *Malcolm v. Rogers*, 5 Cowen, at p. 193, 194; *Rex v. Barlow*, 2 Salk. 609; *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. 112; *Supervisors v. U. S.*, 4 Wall. 435; *Gordon v. Becker*, 54 N. Y. St. R. 731.

² *Gilmore v. City of Utica*, 121 N. Y. 561, 569, and see 131 N. Y. 26; *People, ex rel. Everson, v. Lorillard*, 135 N. Y. 285; *Thompson v. Carroll*, 23 How. 422 434; *Stamper v. Miller*, 3 Atl. R. 212; *King v. Inhabitants of Derby*, Skinner, 370. How doubtful the construction of a statute may be is to be seen in the decision of the New York Court of Appeals in *People v. Rosenberg*, 138 N. Y. 410, where it was held that the law of 1892, chapter 646, prohibiting the business of bone boiling, fat rendering, etc., within the corporate limits of a city, required evidence to show such business was a public nuisance in its locality, and queries "whether the Legislature may absolutely prohibit a business when it is neither alleged or claimed that in its nature, or from the manner in which it is conducted it injuriously affects the community." See, however, *Board of Health v. Copcutt*, and *People, ex rel. Copcutt, v. Board of Health of Yonkers*, 140 N. Y. 1, 12, where the action of the Board of Health in the removal of a dam on the Nepperhan river, and an ordinance prohibiting its restoration are sustained.

tional provision which attempts to regulate the language and forms of expression to be used in legislative enactments, is not to be so construed as to embrace cases not fairly within its general purposes or policy, or the evils it was intended to correct, although they may be within its letter." Nor is it to be so construed "as to work a public mischief, unless its language is of such explicit and unequivocal import as to leave no other course open to the court, and when its intent is ascertained that must prevail over its letter."

CHAPTER XVI.

LICENSES, TAXES AND REGULATIONS FOR OCCUPATIONS.

In a previous chapter¹ we have seen the intervention of the police power of the State in respect to certain employments where the safety of persons and property are concerned. Examinations and tests and rules and regulations are prescribed which are opposed to individual rights in labor and service, but govern because of a necessity discovered by the legislature to protect the public. Engineers of railroads, pilots, engineers and licensed officers of steamboats, on the one hand, may not continue in their chosen work without public license and authority;² on the other hand once engaged, they cannot willfully dismiss themselves and their duty³ if required by law, or order of the court, to continue for a time their service. In like manner, obligations for the public account laid upon professional men, and those who have a public sanction, and enjoy peculiar privileges, as do clergymen and physicians, are compelled to make reports, and perform a public duty. There is however a wider range to this influence, springing from the same general causes, and leading to a greater control of occupations from motives of public policy.

The power of taxation may in one sense be called a police power, touching different classes peculiarly, yet when all persons in the same calling are taxed alike, they are held to be equal and uniform so far as regards the constitutional guaranties to liberty and to property. It is a power⁴ declared by Judge Cooley, "so unlimited in force and searching in extent that courts scarcely venture to assert it is subject to any restrictions, except such as rest in the discretion of the

¹ Chapter IV, pp. 60-64.

² *Smith v. Alabama*, 124 U. S. 465.

³ U. S. R. S., § 4449; *Toledo & R. R. v. Penn. Co.*, 54 Fed. R. 780.

⁴ Cooley Const. Lim., chap. 4, p. 587; Tied. Lim., § 101, p. 383; *Ex parte Williams*, 20 S. W. R. 580; *Ex parte Tyler*, 149 U. S. 164; *Ficklen v. Taxing District of Shelby County*, 145 U. S. 1. *Village of Stamford v. James L. Fisher*, 140 N. Y. 187, sustained a village tax upon persons selling their wares through the streets, "the statute is to be strictly construed."

sage, no person shall be admitted as an attorney or counsellor to the bar of the Supreme Court, etc., or be allowed to appear or be heard, by virtue of any previous admission or any special power of attorney, unless he shall have first taken the oath, or affirmed, that he has never borne arms against the United States since he has been a citizen thereof, and given no aid, counsel or encouragement to persons engaged in armed hostility thereto, nor attempted to exercise the functions of any office, or yielded a voluntary support to any pretended government, or authority within the United States, hostile or inimical thereto; that such law was a legislative decree excluding persons, who have offended in the particulars enumerated, from the practice of law, was a punishment for such conduct; was an *ex post facto* law; and was beyond the power of Congress; that the right of an attorney and counsellor acquired by his admission to appear for suitors and to argue causes, is not a mere indulgence revocable at the pleasure of the court, or at command of the legislature. He can only be deprived of it after opportunity to be heard has been afforded and by judgment of the court for moral or professional delinquency; and that a pardon received for all offenses committed by participation in the rebellion relieved from all penalties or disabilities attached thereto.”

The dissenting opinion by four of the judges states that there is a “fatal vice in the reasoning of the majority in the meaning they attach to the word ‘punishment,’ in its application to this law, and its relation to the definitions which have been given of the phrase *ex post facto* laws” and again that a distinction is to be observed in the purpose of the act, which was “to require loyalty as a qualification of all who practice law in the national courts,” not a purpose to impose a punishment for past acts of disloyalty. The qualifications prescribed for the offices of President and Vice-President, or in many of the States, for white male voters, or of a limit of age for the office of judge, are not punishments to all other citizens than those who have such qualification. In some of the States it is required “for the office of a judge that the person should not be over sixty years of age. To a very large number of the ablest lawyers in any State, this is a qualification, to which they can never attain, for every year removes them further away from the designated age. Is it a punishment?”

This interesting discussion followed the case of Cummings in the same court where the conclusion was adopted that the article in the

Constitution of Missouri depriving priests and clergymen of the right to preach and teach, unless they subscribe an oath that they have not committed certain designated acts in the rebellion against the United States, imposed a penalty, and violated the provision of the Federal Constitution prohibiting the passage by the States of an *ex post facto* law. "That deprivation of or suspension of any civil rights for past conduct, is a punishment and the article presumed the priests and clergymen guilty of the acts specified and adjudged the punishment unless the presumption was removed by an expurgatory oath. This is also a violation of the constitutional provision in altering the rule of evidence in assuming guilt instead of innocence; and although the prohibition of the Constitution to pass an *ex post facto* law is aimed at criminal cases, it cannot be evaded by giving a civil form to that which in substance is criminal."

Mr. Justice Miller called attention to the *Permoli case*,¹ where, by an ordinance of the city of New Orleans, a penalty was imposed on any priest who should officiate at any funeral in any other church than the obituary chapel. The appellant, a Catholic priest, "had performed the funeral services of his church over the body of one of his parishioners inclosed in a coffin, in the Roman Catholic Church of St. Augustine," and was fined. The court replied "that the Constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State Constitution and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect."

Again, in *Ex parte Wall*, these privileges are considered at length, and also the reserved power of the courts over its attorneys in matters of public offenses indictable and distinct from the attorney's professional conduct. "To disbar an attorney is to inflict upon him a punishment of the severest character." Surely the tremendous power of inflicting such a punishment should never be permitted to be exercised unless absolutely necessary to protect the court and the public from one shown by the clearest legal proof to be unfit to be a member of an honorable profession. To disbar an attorney for an indictable offense, not connected with his professional character, before trial and conviction, is also to inflict an additional wrong upon him. It is to give the moral weight of the court's judgment against him upon the trial of an indictment for that offense," is the statement of the dissenting opinion.

¹ 8 How. 589.

² 107 U. S. 818.

The circumstances were peculiar; and as they are spread upon the record, afford a singular illustration of the necessity of almost unlimited, and practically undefined, police powers, even to maintain the dignity of the court and the majesty of law. The answer to a rule to show cause why a mandamus should not issue restoring the petitioner to the bar, stated that "during a session of the Circuit and District Courts of the United States at Tampa, in the Southern District of Florida, he, the said James Locke, presiding, on the 6th day of March, A. D. 1892, at the adjournment of said courts for dinner, at about one o'clock of said day, as he was passing from the court-house, a prisoner was being brought to the jail in the same yard by two officers; that upon his return to the court-house after dinner, in a little more than an hour, the dead body of the same prisoner hung from the limb of a tree directly in front of the court-house door, whereby he became informed of a most serious offense against the laws. The same afternoon he was informed of the active participation in said crime of one J. B. Wall, an attorney of said court, by an eye-witness in whom the most explicit confidence could be placed, but who declined to make any charge or affidavit of such fact, on account of a fear of said Wall's influence, and the local feeling it would cause against him, the said witness.

"That not only from the direct statements of eye-witnesses, but from numerous other sources, reliable information of like import was received; whereupon said J. B. Wall, your petitioner, was, on the said 7th day of March, during a session of the Circuit Court of the United States, in open court, charged in writing by the respondent herein, as judge, with having, with an unlawful, tumultuous and riotous gathering, he advising and encouraging thereto, taken from the jail of Hillsborough county and hanged to a tree by the neck until he was dead, a man to the court known only as John, and cited by rule served upon him to show cause, by eleven o'clock A. M., of the next day, why his name should not be stricken from the roll of attorneys, and he prohibited from practising in the United States courts of said district.

"The petitioner filed an answer demurring to the right of the court to issue the rule, and demanding that proof be had; whereupon the United States marshal of the district, being duly sworn, testified: The petitioner stated he had no testimony to offer, was heard by counsel, and on the 10th day of March it was ordered that he be prohibited

from practising at the bar of Circuit or District Courts of the district until further order therein.”¹

The Supreme Court refused the writ, saying: “We think that the court below did not exceed its powers in taking cognizance of the case in a summary way, and that no such irregularity occurred in the proceedings as to require this court to interfere by the writ of mandamus.” The opinion of the court explains that “it would undoubtedly have been more regular to have required the charge to be made by affidavit, and to have had a copy thereof served (with the rule) upon the petitioner. But the circumstances of the case seem to us to have been sufficient to authorize the issuing of the rule without such an affidavit. The transaction, in which the petitioner was charged with participating, was virtually in the presence of the court. It took place in open day, in front of the court-house, and during a temporary recess of the actual session of the court; and the awful result of the lawless demonstration was exhibited to the judge on his return to the court-house. Under the intense excitement which prevailed, it is not wonderful that no person could be found willing to make a voluntary charge against the petitioner, or any one else, and yet the fact that he was engaged as one of the participators was so notorious, and was brought to the judge’s knowledge by information so reliable and positive, that he justly felt it his duty to take official notice of it, and to give the petitioner an opportunity of repelling the charge. This was done in such a manner as not to deprive him of any substantial right. The charge was specific, due notice of it was given, a reasonable time set for the hearing, and the petitioner was not required to criminate himself by answering under oath.”²

¹ 107 U. S. 270, 290. The distinction between private or civil and public or criminal contempt pointed out, *People, ex rel., v. Court of Oyer & Terminer*, 100 N. Y. 245; *King v. Barnes*, 118 N. Y. 476. As to power of legislature to limit remedy in contempt, see *In re Shortridge* (Col.), 34 Pac. R. 227.

² 107 U. S. 271; see *Randall v. Brigham*, 7 Wall. 523, 539; *Archbold Pr. ed. Chitty*, p. 148; 1 *Tidd Pr.* 89; *Stephens v. Hill*, 10 Mees. & W. 28; *Rex v. Southerton*, 6 East, 126. In the *Matter of King*, 8 Q. B. 129; *Fields v. The State*, Mart. & Y. (Tenn.) 68; *Ex parte Burr*, 1 *Wheeler Cr. Cases*, 508; 2 *Cranch C. C.* 379; *In re Blake*, 3 El. & El. 34; *Re Hill*, L. R., 3 Q. B. 548; *Smith v. The State*, 1 *Yerg.* (Tenn.) 228; *Perry v. State*, 3 *Greene (Iowa)*, 550; *In re John Percy*, 86 N. Y. 651; *Penobscot Bar v. Kimball*, 64 Me. 140; *Delano’s case*, 58 N. H. 5; *Matter of G. W. Wool*, 36 Mich. 299; *Ex parte Eldridge*, 82 N. Y. 161; *Ex parte Walls*, 64 Ind. 461. In other cases where the offense was indictable, the rule to strike off the roll has been refused; see 2 *Halst. (N. J.)* 162; 3 *Nev. & Perry*, 389; *State v. Forman*, 3 Mo. 412; *Ex parte Fisher*, 6 *Leigh (Va.)*, 619; *Beene v. The State*, 23 Ark. 149; *Ex parte Steinman*

The opinion of Lord Denman¹ is cited, that "the facts stated amount to an indictable offense. Is it not more satisfactory that the case should go to a trial?" But the distinction taken by Lord Abinger between a rule to show cause and the rule calling on the attorney to answer an affidavit, is approved. The answers to the objections raised *In re Blake*, given by Lord Chief Justice Cockburn, and the similar proceedings *In re Hill*, where Mr. Justice Blackburn also concurs, "that when an attorney is shown to have been guilty of gross fraud, although not such as to render him liable to an indictment, nor committed by him while the relation of attorney and client was subsisting between him and the person defrauded, or in his character as an attorney, the court will not allow suitors to be exposed to gross fraud and dishonesty at the hands of one of its officers," is upon the same plane of high consideration for the purity and duty of courts and their officers, and of regard for the public welfare to which they minister.² Of still

& Hensel, 95 Pa. St. 220. "Removal from office for an indictable offense is no bar to an indictment." *In re* a solicitor; *Ex parte* The Incorporated Law Society, 61 L. T. R. (N. S.) 842; *In re* Wear, 69 L. T. R. 522; see articles in 49 Alb. L. J. 2, and an interesting discussion in London Law Times, December 16, 1893, of case of Wear, a solicitor, stricken from the rolls upon the application of the Incorporated Law Society, after conviction under section 18 of the Criminal Amendment Act of 1885, of being a party to the continued use of a house of which he was landlord as a brothel.

¹ 5 Barn. & Adel. 1038; 3 Nev. & Perry, 389; and Lord Lyndhurst, in 2 Dowl. P. C. 110.

² In a note in the Criminal Recorder (1 Wheeler Cr. C. 336), in *Bank of New York v. James Stryker*, it is said: "Attorneys are officers of the court, and may be punished on a summary process, either by attachment or by having their names struck off the roll of attorneys for an ill practice attended with fraud and corruption, and committed against the obvious rules of justice and common honesty." Bac. Abr. 1, p. 192, tit. Attorneys; 6 Mod. 16, 187; 1 Wills, 23; 2 Wills, 332; Loft, 271; 3 Cai. 221; 1 Mart. 129, and *King v. Bromsell*, Comp. 880, is referred to, as it is afterward in the opinion in *Burr's case*, in the same volume. The application was to strike Bromsell off the roll of attorneys, he having been convicted of stealing a guinea, and branded in the hand, and suffered five years, and no misconduct since having been imputed to him. It was contended that the benefits of clergy which he had received and his burning in the hand operated as a statute pardon, and that to strike him off the roll would be to punish him twice for the same offense. Lord Mansfield said: "This application is not in the nature of a second trial or a true punishment. But the question is, whether, after the conduct of this man, it is proper he should continue a member of a profession which should stand free from all suspicion. Suppose he had been a justice of the peace, the conviction itself would not remove him from the commission, but could there be a doubt that he ought to be struck out of the commission? As at present advised, I am of opinion, without any doubt, that the rule should be made absolute. But, as it is for the dignity of the profession

higher importance are the questions of public interest and authority, when the lash of discipline is sought to be applied to the courts themselves, and to judges or officers whose terms of office have expired.

In a recent case, it has been held that "private citizens are not amenable to impeachment, and that the legislature has no authority to prefer articles of impeachment against ex-officials." The English cases of Warren Hastings and Lord Melville are dismissed from consideration because "no plea to the jurisdiction was, or could be raised, for the obvious reason that Parliament is omnipotent. As all persons in England, those in as well as those out of office, are subject to impeachment, the cases of Hastings and Melville are not in point." Blount's and Belknap's cases are also reviewed. "William Blount was a United States Senator from Tennessee. He was expelled by the Senate for official misdemeanor, and was subsequently impeached by the House of Representatives for the same act. He pleaded that a Senator is not a civil officer, within the meaning of the Constitution, and also that he was not a Senator when the articles of impeachment were adopted. His plea was sustained upon the first ground alone, and therefore the ruling in that case is not an authority either way on the question before us."

The House of Representatives impeached William W. Belknap for acts committed while Secretary of War. On the day the articles of impeachment were adopted, but prior to their adoption, Mr. Belknap resigned, and his resignation was accepted by the President. Before the trial the respondent interposed a plea to the jurisdiction, on the ground that he had ceased to be an officer before he was impeached. The question was ably argued, and the Senate of the United States, sitting as a court of impeachment, overruled the plea. At the close of the trial Mr. Belknap was acquitted. "The Senators who voted against conviction, the record shows, did so upon the express ground that the House of Representatives had no jurisdiction to impeach him, and the Senate was without jurisdiction to try him, inasmuch as he had ceased to be a civil officer."

that a solemn opinion should be given, we will take an opportunity of mentioning it to all the judges." Afterward, upon the unanimous opinion of the judges, the rule was made absolute.

¹ *State v. Hill*; *State v. Benton*, Sup. Ct. of Nebraska, June, 1898, 55 N. W. R. 794; N. Y. L. J., Aug. 25, 1898, ed.; *Impeachment trials*, W. W. Belknap, Wash., 1876; George G. Barnard, 8 v., Albany, 1872; William Blount, Phil., 1799; Albert Cardozo, New York, 1872; Samuel Chase, 2 v., Wash., 1805; Warren Hastings, 2 v., 1794; John McCunn, Albany, 1874; George H. Smith, Albany, 1866.

The opinion recites the facts of the impeachment trials of Judge Barnard of the New York Supreme Court, of Governor Hubble of Wisconsin, and of Governor Butler of Nebraska, for offenses committed in their preceding terms of office, and construes the meaning of the article of the Constitution of the State appealed to, as confined to offending parties still in office, and because the defendants had ceased to be officers by the expiration of their official terms, and had done nothing to defeat the jurisdiction of the court, dismisses the case against them. It says: "It is urged by counsel for the managers that ex-officers are liable to impeachment for official misdemeanors committed while in office; that jurisdiction attaches immediately upon the commission of an impeachment offense; and that the expiration of the official term does not deprive the legislature of the power to impeach or the court to try. It cannot be said that there is any provision in the Constitution which expressly confers the authority to impeach a person after he is out of office; while section 5, already quoted, designates the persons who may be impeached as 'all civil officers of this State.' This language is unambiguous. It means existing officers—persons in office at the time they are impeached. Ex-officials are not civil officers within the meaning of the Constitution. Jurisdiction to impeach attaches at the time the offense is committed, and continues during the time the offender remains in office, but no longer. The necessary implication of the provisions in section 14, article 3, of the Constitution, that 'judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold and enjoy any office of honor, profit or trust in this State, is that the offending party must be in office at the time the impeachment proceedings are commenced. In case of impeachment either one of two judgments can be pronounced, namely, removal from office, or removal and disqualification to hold office. It is obvious that there can be no judgment of removal where the party was not an officer when impeached. It is claimed by counsel for the managers, as we understand their argument, that a judgment of disqualification can be entered without a judgment of removal. All will concede that disqualification to hold office is a punishment much greater than removal; so that, if the construction contended for by counsel is a true one, then, in case the person impeached is out of office, he is liable to a more severe penalty than might have been inflicted upon him had he been impeached before he went out of office. We cannot believe that the members of the convention who framed the Constitution so intended."

Judge Story, in discussing the question whether a person can be impeached after he has ceased to hold office, at section 803 says: "As it is declared in the clause of the Constitution that judgment in cases of impeachment shall not extend further than a removal from office, and disqualification to hold any office of honor, trust or profit under the United States, and in another clause, that the President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery or other high crimes, it would seem to follow that the Senate, on the conviction, were bound in all cases to enter a judgment of removal from office, though it has a discretion as to inflicting the punishment of disqualification. If, then, there must be a judgment of removal from office, it would seem to follow that the Constitution contemplated that the party was still in office at the time of impeachment. If he was not, his offense was still liable to be tried and punished in the ordinary tribunals of justice. And it might be argued with some force, that it would be a vain exercise of authority to try a delinquent for an impeachable offense, when the most important object for which the remedy was given was no longer necessary or attainable; and, although a judgment of disqualification might still be pronounced, the language of the Constitution may create some doubt whether it can be pronounced without being coupled with a removal from office."

"But, independent of authorities or precedents, if we do not misconceive the meaning of the Constitution, there is no room for doubt that ex-officials are not impeachable, since civil officers alone are enumerated in that instrument as subject to that remedy. The term 'officer' cannot properly be applied to a person who is not at the time in the holding of an office. When a person ceases to hold an office, he immediately becomes a private citizen."

In this consideration of the growth of the discipline of courts from public necessity and an enlightened public policy, it is interesting to note somewhat of the history and phases of the privileges assumed and maintained for the legal profession.

In the Burr case, one of the earliest reported in the United States Circuit Court for the District of Columbia, Chief Justice Cranch outlines it as follows:¹ "It is said that in ancient times, by the law of

¹ 1 Wh. Cr. Cas. 510, 837; see West. 2, chap. 10; 3 Jac. 1, chap. 7; 4 H. 4, chap. 18, and act of Maryland, 1715, chap. 88. In *Crim. Rec.*, at p. 837, in Stryker's case, 1816, there is by the editor the following note: "Originally the parties in a suit attended court in person, and it was only by special statutes that they were allowed to prose-

England, those of the courts had it in their power whether they would suffer men to appear or sue by others than themselves; the courts therefore had a right to say by what attorney the party should appear; afterward however it became customary for parties to obtain the King's writ, commanding courts to admit them to appear by attorney specially named in the writ. Subsequent statutes however gave to all persons a liberty of appearing and appointing an attorney as if they had letters-patent. As this liberty soon became abused by the appointment of ignorant attorneys, the statute of Henry IV 4, chap. 18, was enacted in 1402, directing that all attorneys shall be examined by the justices, and by their discretion their names put on the roll, and that they be good and virtuous and of good fame, shall be received and sworn well and truly to serve in their office, and especially that they make no suit in a foreign country, and the other attorneys shall be put out by the discretion of said justices," etc., etc. We are reminded in this way of the rise of law and of formal procedure in the Roman republic through the responses and co-operation of the *juris prudentium*. Gaius tells us in his Commentary, on the origin of law, "*et certe cujusque rei potissima pars principium est,*" and Pomponius has declared "*his legibus latu coepit, ut interpretatio desideraret prudentium auctoritate necessariam esse disputationem fori. Haec disputatio et hoc jus, quod sine scripto venit, compositum a prudentibus communi nomine appellatur Jus Civile. Deinde ex iis legibus eodem tempore fere actiones composita sunt, quibus inter se homines disceptarent: quas actiones ne populus prout vellet, institueret, certas solemnesque esse voluerunt; et appellatur haec pars juris Legis Actiones, id est, legitimae actiones. Et ita eodem pene tempore tria haec jura nata sunt: leges XII tabularum; ex his fluere coepit jus civile; ex iisdem legis actiones composita sunt.*"¹

In New York in 1815, in the matter of the sheriff and jailer on complaint of McClellan, counsel for a prisoner, refused access to him, the recorder said: "It is here proper to premise that when we speak of a right or privilege of counsel we mean the right or privilege of the client. It is the sacred right of every man to be heard in his own defense, to keep

cute and defend by attorney. By the statute, 8 Jac. 1, chap. 7, it was provided that those only shall be admitted who were well practised in soliciting causes, and had been found by their dealings to be skillful and of honest dispositions."

¹ L. 1 ff de orig juris; L., 2 id.; Juris Civilis Ecloga, 1, 16, Paris, 1822; id. de Resp. Prudent, 16-18.

his own secrets,' to confront his accusers, to impeach the testimony of those who come to destroy him. But as all men are not equally competent the law allows of advocates. The privilege of the lawyer is in fact the privilege of the client, and hence it hath been solemnly adjudged that if a member of the bar should be so base as to reveal the secrets of his client, the court would not permit him to do it." This privilege has been preserved in legislation, and in many of the Codes we find such enactments as in that of New York, that "an attorney or counsellor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment." The provisions, as similar ones respecting and guarding confessions made to a clergyman or minister of any religion in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs, and the information acquired by a person duly authorized to practice physic or surgery in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity, all these provisions may be waived.

In England a recent decision has compelled the divulgence by a clergyman on the witness stand, of a penitential confession of adultery received by him, and while the sentiment of judges has been in favor of a contrary course, the English law is held to be as applied in this case.¹

Among other privileges of "clergy," there still remains in many of the States a certain limited exemption from taxation. In the State of New York the amount of exemption is fifteen hundred dollars.² As belonging to every occupation and citizen, from the point of view of taxation as in any wise dependent on police powers, we are interested

¹ 1 Wheeler Cr. Cas. 307; N. Y. Code Crim. Pro., § 885.

² Chief Justice Best and Baron Alderson were opposed to compelling clergymen to divulge confessions, but the English law is as stated and applied by Sir Francis Jeune. Lond. L. T. 48; Alb. L. J. 128, notes. Qualifications of these rules of evidence in New York State are found in chapter 295 of 1898, especially as to waiver.

³ 2 R. S. 982, § 8; L. 1884, chap. 537, p. 654; People, *ex rel.* Mann, v. Peterson, 81 Hun, 431. The exemption is of the personal property of every minister of the Gospel, or priest of any denomination, or every such minister or priest who is permanently disabled by impaired health from performing the active duties of the ministry, and every such minister or priest who has reached the age of seventy-five years; and the real estate of such minister or priest, or such disabled or aged minister or priest, when occupied by him, provided such real and personal estate do not exceed the value of \$1,500.

in the common exemptions from taxation and from execution of the necessary property and implements of the householder, the mechanic and professional man.¹

It follows necessarily that entrance into the privileges and assumption of the duties and obligations of the learned professions is guarded by the State. With respect to clergymen, the legislator has not ventured beyond very general language, remitting them to the pains and penalties of their own creeds, churches and religion.²

For lawyers, physicians and teachers something more than clerical experience and purely special training is required. Certain preliminary examinations, or diplomas and certificates, are demanded before the entrance course of study is begun. In the State of New York the Board of Regents of the University of the State of New York, at Albany, regulate the conditions of a preliminary certificate. The Court of Appeals of that State has fixed the rule that "before any person shall enter upon the clerkship or substituted course of study hereinafter provided, or in one year thereafter, he shall, if not a graduate of a college or university registered by the Regents as maintaining a satisfactory standard, pass an examination conducted under the authority and in accordance with the ordinances and rules of the University of the State of New York, in English composition, first year Latin, arithmetic, geometry, English and United States history, and civics, or in their substantial equivalents, defined by the rules of the University, and file a certificate of such fact, signed by the Secretary of the University, with the Clerk of the Court of Appeals, who shall

¹ System of Taxation, Davies, pp. 68, 69; see the exemption of buildings erected for the uses of seminaries of learning and for public worship, of spinning wheels, weaving looms, and stoves kept for use in a dwelling-house, and one sewing machine, the family Bible and books to the value of \$50; the pew in church, ten sheep, one cow, two swine, and food for the use of the family for sixty days; wearing apparel and certain necessary furniture, the tools and implements of a mechanic, professional instruments, furniture and library not exceeding \$250, and food for a team for ninety days when used by a householder.

² *e. g.* In N. Y. Laws concerning marriage, the phraseology is used as to "persons authorized to solemnize marriages, ministers of the Gospel, or of legally incorporated religious congregations, the leader of the Society for Ethical Culture in the city of New York, and priests of every denomination. See restrictions, chap. 460, 1893, N. Y. Penal Code, 306. Solemnizing marriages where there is a legal impediment, or assuming to grant a divorce, is a misdemeanor. In many States a license must be obtained, and frequently a publication and registration. N. Y. Laws, chap. 242, 1893, adds Judges of County Courts, Justices of the Peace, Justices of the District and Police Courts to the officers who may perform the ceremony.

return to the person named therein a certified copy of the same, showing the date of such filing."

For medical men we have the following: "No person¹ shall practice medicine after September first, eighteen hundred and ninety-one, unless previously registered and legally authorized, or unless licensed by the Regents and registered as required by this article; nor shall any person practice medicine who has been convicted of a felony by any court, or whose authority to practice is suspended or revoked by the Regents on recommendation of a State board. There shall continue to be three separate boards of medical examiners of seven members each, each of whom shall hold office for three years from August first of the year in which appointed. One board shall represent the Medical Society of the State of New York, one the Homœopathic Medical Society of the State of New York, and one the Eclectic Medical Society of the State of New York. Each of these three societies shall, at each annual meeting, nominate twice the number of examiners to be appointed in that year on the board representing it. The names of such nominees shall be annually transmitted under seal by the president and secretary prior to May first to the Regents, who shall, prior to August first, appoint from such lists the examiners required to fill any vacancies that will occur from expiration of term on August first. Any other vacancy however occurring, shall likewise be filled by the Regents for the unexpired term. Each nominee, before appointed, shall furnish to the Regents proof that he has received the degree of doctor of medicine from some registered medical school, and that he has legally practised medicine in this State for at least five years. If no nominees are legally before them from a society, the Regents may appoint from members in good standing of such society without restriction. The Regents may remove any examiner for misconduct, incapacity or neglect of duty."

For dentistry we have a similar rule: "No person² shall practice dentistry in this State as principal, assistant, agent or employee, or advertise or hold himself out to the public as so practising who shall not be licensed and registered as prescribed in this article, or who was not lawfully licensed or registered when this chapter takes effect. Nothing herein shall disqualify any person for performing merely mechan-

¹ N. Y. L., chap. 661, 1893, being chap. XXV of the General Laws, Art. VIII, Practice of Medicine.

² Id. Art. IX, Practice of Dentistry.

ical work upon inert matter in a dental office or laboratory; or a registered student for the purpose of clinical instruction in the presence and under the immediate supervision of his preceptor, from assisting the latter in dental operations; or duly licensed and registered physician or a surgeon for his lawful acts in the practice of his profession. A person shall be deemed licensed to practice dentistry in this State who shall have attained the age of twenty-one years, and shall have had properly granted to him either by the Dental Society of the State of New York, or an incorporated medical or dental school approved by such society, a diploma conferring a recognized medical or dental degree. No diploma shall be deemed valid if conferred irregularly, through fraud or misrepresentation, or without substantial compliance by the person to whom granted, or the corporation conferring it, with the general statutory requirements of this State as to the course and duration of preparatory and professional study, and also with the regulations of such State society, and of the corporation conferring the diploma as to study, attendance, examination and character.

For veterinary surgeons there are also qualifications: "No person shall practice veterinary medicine or surgery, or any branch thereof, as a profession, in this State for compensation, or shall directly or indirectly receive or accept any compensation for his services as a practitioner of veterinary medicine or surgery, unless he has been duly registered pursuant to the provisions of the laws in force immediately preceding the time when this article takes effect, or unless he is a graduate of a legally chartered or incorporated college or university, or holds a certificate of qualification from a legally incorporated veterinary society, and is duly registered as provided in this article." But students may prescribe under the supervision of preceptors, and gratuitous services may be rendered in case of emergency; and an authorized practitioner of a neighboring State may render services in this State, who is called for the purpose of consultation with an authorized practitioner of this State.

Druggists come under like prescription. In the counties of New York, Kings and Erie, special Boards of Pharmacy are given control. In the rest of the State, "There shall continue to be a State Board of Pharmacy for the State," excepting the counties of New York, Kings and Erie, of five members, each holding office for

¹ Id. Art. X, Veterinary Medicine and Surgery.

² Id. Art. XI; Mass. Stat. 1889, chap. 270; Pub. Stat., chap. 100; Com. v. Banks, 156 Mass. 238; People v. Rontey, 117 N. Y. 624.

a term of five years from the first Tuesday in September of the years when such term begins. The New York State Pharmaceutical Association shall at each annual meeting nominate five pharmacists, residents of the State, but not of the said counties, from which number the Governor shall fill the vacancy annually occurring in said board by expiration of the term of one of the incumbents. If a vacancy occurs from any other cause than expiration of term, the Governor shall fill the vacancy from the list of names so nominated at the annual meeting of such association next preceding the happening of the vacancy." "Such Board of Pharmacy shall: Examine all applicants for license under this article, and grant license to such as may be entitled thereto. Keep a record of all pharmacists and assistant pharmacists licensed or authorized by it. Investigate all complaints of disregard of, non-compliance with, or violation of any provision of this article, and bring all such cases, and all cases of offenses against the provisions of the Penal Code relating to pharmacy, to the notice of the proper prosecuting officer. Render annually to the Governor and to the State Pharmaceutical Association at its annual meeting, a full statement of all its receipts and disbursements during the preceding year." A register or record is kept of all these practitioners, and medical men of the several classes register in a book kept for each of their professions by the clerk of the county.

Teachers for the common schools, high schools and normal schools must have their certificates of examination or diplomas. In the act to revise and consolidate the general acts relating to Public Instruction in New York¹ is the provision to be found generally in similar acts, *i. e.*, "No teacher is a qualified one within the meaning of this act unless he possesses an unannulled diploma granted to him by the State Normal School or an unrevoked or unannulled certificate of qualification given to him by the Superintendent of Public Instruction, or an unexpired certificate of qualification given to him by the school commissioner within whose district he is employed, or by the school officer of the city or village in which he is employed, authorized by special act to grant such certificate."

Plumbers for many years have been under the supervision of the health authorities and their work has been commanded, condemned or inspected by sanitary officials. Frequently an examination and a license are required. One of the latest laws is that of New York in 1892 whereby Boards of Examiners are constituted, a plumbing code

¹ N. Y. L., chap. 555, 1864, § 41.

authorized, and it was enacted¹ that "From and after the first day of March, 1893, the plumbing and drainage of all buildings, both public and private, in each of the cities of the State shall be executed in accordance with the rules and regulations adopted by the local Board of Examiners in conjunction with the Board of Health, for plumbing and drainage; and all repairs and alterations in the plumbing and drainage of all buildings heretofore constructed shall also be executed in accordance with such rules and regulations, except in New York, Brooklyn and Albany, where the Board of Health shall have control; but this section shall not be construed to repeal existing provisions of law requiring plans for the plumbing and drainage of new buildings to be filed with any local Board of Health, and to be previously approved in writing by said Board of Health, and to be executed in accordance therewith, except that in case of any conflict between such plans and the rules and regulations of the Board of Examiners the latter shall govern. Builders, masons, carpenters and employees are subject to the restrictions in building laws relative to many parts of the work with which they have to do and the materials they employ."² Examples are taken from the legislation in New York which may be multiplied by reference to other States. Even the scaffolding hoists, stays and ladders are regulated.³

"No owner or agent of any steam boiler shall employ any person as engineer not having a certificate as to qualification from practical engineers, to be countersigned by the Commissioners of Police. The Superintendent of Buildings shall make regulations for the inspection of passenger elevators with a view to the safety of passengers; and shall also prescribe suitable qualifications for persons who are placed in charge of running passenger elevators. No person shall employ or permit any person to be in charge of running any passenger elevator who does not possess the qualifications prescribed therefor."⁴

Fishermen are subject to the laws for the protection of game.⁵

¹ N. Y. L., chap. 602, 1892; a certificate of competency is now required, chap. 66, N. Y. L. 1893.

² See, *e. g.*, N. Y. L. chap. 566, 1887, §§ 480, 482, as to brick and materials, the sand used for mortar, cement, mortar, laying of bricks in non-freezing weather; §§ 486, 491, 492, 494, 495, 500, as to windows, floors, beams, doors, planking, etc.; chap. 275 L. 1892, §§ 479, 483, 488, 489, 490, 492.

³ N. Y. L. chap. 214, 1891.

⁴ N. Y. Cons. Act, 1882, § 812; N. Y. L. chap. 275, 1892, § 492; chap. 566, 1887, § 15, amending § 487. As to auctioneer's sales in New York, see chap. 289, 1893.

⁵ R. S. of Indiana, § 2117, makes it a misdemeanor to have in possession a gill-net or sieve, except in certain cases. This was held to be constitutional. *State v. Lewis*, Ind. Sup. Ct., Apr. 19, 1893, 33 N. E. R. 1024; see 119 N. Y. 226.

Other laws are passed regulating occupations, in some respects, because of the public interest in their followers, but principally for the protection of those unable to secure their own interests without such intervention. Such are the reasons given, as we have seen heretofore in the case of seamen. Children trained for shows and the stage fall under a similar guardianship.¹

Other occupations again, contrary to all laws, revolting in any consideration² either of their followers or their use, intrude themselves upon every general discussion of police powers or legislation, partly because the experiment has been made in many countries of regulating them, but especially because of the direful consequences they entail to thousands innocent even of their knowledge. Such are those connected with prostitution or "the social evil," often considered alone under the Penal Code or criminal laws, and not recognized in our land as coming under the civil administration in any sufficient degree to necessitate our dwelling at length upon them.³

In Germany, France, Austria, Italy, Belgium, Denmark, and in the colonies as well as the nations of the East, we find an elaborate "police des mœurs," and a governmental treatment, which is a *quasi* recognition

¹ See chap. 4, and also Shipping Laws, chap. 4, note 76, chap. 173, N. Y. L. 1893; see chap. 175. The People of the State of New York, respondents, v. Charlotte Ewer, appellant. In the matter of the application of Charlotte Ewer for writs of *habeas corpus* and *certiorari*. 70 Hun, 239; aff'd, N. Y. Ct. App., Jan., 1894. The opinion says: "Chapter 292 of the Penal Code is not to be construed as applying only when the exhibition offends against morals or decency, or endangers life or limb, or what is required of the child actor. Its application is to all public exhibitions or shows. The inalienable right of a child or adult to pursue a trade is indisputable, but it must be not only one which is lawful, but which, as to the child of immature years, the State, as *parens patriæ*, recognizes as proper and safe. The cases which limit the exercise of the police power establish that the Legislature has no right, under the guise of protecting health or morals, to enact laws which, bearing but remotely, if at all, upon these matters of public concern, deprive the citizen of the right to pursue a lawful occupation."

² As Plautus says of the pimp, Cur. III, 2, 13-17:

Cu. "Item genus est lenonium inter homines meo quidem animo bono usui estis nulli."
Nec vobiscum quisquam in foro frugi consistere audet
Qui consistit, culpant eum conspuitur vituperatur
Eum rem fidemque perdere tametsi nihil fecit aiunt."

³ Baltimore and St. Louis have passed ordinances; as, *e. g.*, that of St. Louis, 1871, regulating houses of ill-fame; Baltimore at a very much earlier period; Minneapolis in the last few years has exercised so severe a police supervision over disorderly houses and their location that it has been erroneously reported as having a registration system, but this is not strictly true.

and endurance of, the evil subject.¹ Set out at great length in the Index-Catalogue of the library of the Surgeon-General's office at Washington, we have hundreds of publications, including many of laws and decrees under this title, "Prostitution." Most instructive is its history and the statistics by localities, indicated in this splendid work. We shall content ourselves with extracts from a report of the sanitary committee on prostitution made to the legislature of New York in 1827, by Doctors John O. Stone, Willard Parker and James Crane, whose reputation and position in the community added, if possible, weight to their words. No less interest exists to-day in this matter, although these recommendations have never been realized except in a very limited degree.

This document contains statistics and a recital of facts, to be measured relatively with the population of to-day, and its proportionate suffering from the same causes. They exhibit a curious contrast between the lavish expenditure and provisions for hospitals and charitable institutions, forced upon cities under the same public policy, and the police powers, which alone can secure remedial measures such as were contemplated, and the aversion of governments like those of our States to encourage and establish a new field of labor, to which moral convictions and the sentiment of the people have hitherto barred the approach.

The authors say: "Prostitution has always existed in all large communities, and will continue to exist until the present order of society shall be changed, or until the golden age of virtue, which poets have foretold, and the wise and good anticipated, shall have come. The actual and important fact is that venereal disease is sapping the strength of the people. * * * These facts must bring the subject home to every individual, and all ought to resolve that such diseases shall not continue to exist, if in God's Providence they can be eradi-

¹ At the International Medical Congress in Philadelphia in 1876, there was a treatise read on the measures adopted in Denmark to prevent the spread of venereal disease, published *Philadelphia*, 1877. In Italy there was from *Ministro dell' interno Regolamento sulla prostituzione approvati con decreto reale, 27 Marzo, 1888*, published Verona, 1888.

Index-Catalogue of the library of the Surgeon-General's office, U. S. army, vol. 11, pp. 700-713.

Prostitution und deren regulirung in Wien, Wien, 1863.

Projet de règlement sur la prostitution par le conseil centrale de salubrité de Bruxelles, 1888, 1877.

Report of Met. Board of Health, N. Y., 1867, pp. 460-9.

cated. The question moreover is not a private one, but of great political importance, for the health of the citizens is the wealth and power of the State. The laboring population are ruined in health and made dependent on the public charities. During the late war great numbers of the soldiers of our army were incapacitated." * * * *
 "To speak of prostitution and the diseases resulting from it, and especially to propose to treat these diseases, and subject the wretched women who pursue this occupation to police and medical surveillance, in hopes of eradicating their diseases, is at first revolting, and has met with opposition, even in those countries which ultimately have changed their views upon the subject. Many thoughtful and good men have in times past urged upon the authorities the necessity of this control, but no one can revive the subject without wounding the sensibilities of many worthy persons, who believe that to undertake to treat prostitutes would give encouragement to vice." The report concludes with four recommendations insisted upon "as the foundation of the proposed reform. First: To oblige all hospitals and dispensaries which receive pecuniary aid from the public to treat venereal diseases. Second: The registration of prostitutes and of houses of prostitution and assignation. Third: Hospitals for prostitutes. Fourth: The sanitary inspection of prostitutes."

The suggestion with which this report is submitted to the legislature, as proceeding from a public body like the Board of Health of New York city, which can properly urge upon the government of our State the necessity of enactments etc., is that the whole subject of control or medical supervision has not been covered, and that this must be the work of the legislature. This suggestion is confirmed by the list of titles alone, of the vast number of acts, decrees and ordinances on the subject in other countries.

CHAPTER XVII.

NATIONAL POLICE LEGISLATION ON SPECIAL SUBJECTS.

Comparatively recent national police legislation on the subject of the importation of aliens under contract to perform labor;¹ the several Chinese Exclusion Acts,² and the National Quarantine Law seem at first sight to trench upon the limits reserved, to the exclusive jurisdiction of States and local governments, recognized in our experience, and confirmed both by decisions of Federal and State courts and also by acts of Congress, particularly in respect to quarantine. The extraordinary exigency, and equally extraordinary reasons for the Contract Labor Laws, and Chinese Exclusion Acts, are to be found new born of the political discussions of the last few years. None the less these statutes compel obedience, although their construction and enforcement are by no means settled or determined as yet, and questions of various sorts are constantly occurring and requiring decisions respecting rights, duties and obligations under their terms.

If a law passed by a State in the exercise of its acknowledged powers comes in conflict with the will of Congress expressed in a statute upon a subject national in its character, and committed to its

¹ Act approved Feb. 26, 1885, chap. 164, Rev. S. V. 28, p. 332; see *Ch. Holy Trinity v. U. S.*, 143 U. S. 457; acts of May 6, 1882, July 5, 1884, Oct. 1, 1888, May 5, 1892; act approved Feb. 15, 1893; 6059, Cong. Rec., 48th Congress, 53, 59, as to the Contract Labor Act. "It seeks to restrain and prohibit the immigration or importation of laborers who would never have seen our shores but for the inducements and allurements of men whose only object is to obtain labor at the lowest possible rate, regardless of the social and national well-being of our own citizens, and regardless of the evil consequences which result to American laborers from such immigration," see *U. S. v. Craig*, 28 Fed. R. 795. As to construction of acts, see *Margate Pier Co. v. Harman*, 3 Barn. & Ald. 266; *State v. Clark*, 29 N. J. L. 96; *U. S. v. Kirby*, 7 Wall. 482.

² As to Chinese Exclusion Acts see decision of Mr. Justice Lacombe in the case of *N. Y. Look*, 56 Fed. R. 81; decisions *U. S. C. Ct. Cal.*, Sept. 11, 1893, *In re Jim Lee*; decision *U. S. S. Ct.*, May 15, 1893, as to constitutionality of Geary Chinese Exclusion Act and dissenting opinions of Messrs. Brewer, Field and Fuller, JJ., *Fong Yue Ting v. U. S.*, 149 U. S. 698.

power by the Constitution, the result must be that the act of the State must yield to the law of Congress. "The Congress and the State cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof. That which is not supreme must yield to that which is supreme."

These may be said to be purely American questions, for in this country there is no unlimited power, and in this extension of the power of the general government to new fields, heretofore regulated, as we have seen, by local administrations wherever there has been found special necessity for the protection of public welfare, there is the concurrence of many in the views of Mr. Justice Brewer forcibly expressed in *Budd v. People*, that the parental theory of government is odious.¹ In England it would seem to be otherwise and the omnipotence of Parliament can hardly be brought to serious question.

Throughout our discussion, the localization of purely police powers has become more marked the further they have been extended, and where reserved powers of government were called upon, as for instance, where the peace of the United States has been broken, and the protection of its courts is sought, by *habeas corpus* against the sheriff of a county of California, who held in custody a marshal of the United States because of the performance of his duty in protecting a judge of the United States from assault, the Supreme Court of the United States affirms the "incontrovertible principle, that the government of the United States may, by means of physical force exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it," and that "the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers," and that this must be the case, even if the express terms of an act of Congress then existing may not be cited in support of the action, of the government or its officers adjudged to be necessary.²

New occasions for the exercise of police power continually arise, but unless other foundation can be discerned for national legislation upon them, within constitutional limits, than the necessity alone for the pro-

¹ *Gibbons v. Ogden*, 9 Wheat. 210; *Wilkerson v. Rahrer*, 140 U. S. 545, opinion of Mr. C. J. Fuller; *Brown v. Maryland*, 12 Wheat. 448.

² 143 U. S. 517, dissenting opinion; see dissenting opinion of Peckham, J., in *People v. Budd*, 117 N. Y. 45-52.

³ *Cunningham v. Neagle*, 135 U. S. 1.

tection of the public welfare by a general law, Congress may not be free to act, as was decided in the Civil Rights cases.¹

"In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual States, and cannot be assumed by the national government," is the statement by Mr. Chief Justice Fuller in *Wilkerson v. Rahrer*.² Again, in *Smith v. Alabama*, the United States Supreme Court upheld the doctrine that in the States are the chief repositories of police powers.

The necessity³ however was found existent by the national legislature, and it was held, in the cases under the Geary Act above mentioned, that "the Judicial Department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject." Mr. Justice Andrews, in the Court of Appeals of New York, in *People v. Budd*, has stated the judicial view as follows: "There is little reason under our system of government for placing a close and narrow interpretation on the police power, or in restricting its scope, so as to hamper the legislative power in dealing with the varying necessities of society, and the new circumstances as they arise calling for legislative intervention in the public interest. No serious invasion of constitutional guaranties by the legislature can for a long time withstand the searching influence of public opinion, which, sooner or later, is sure to come to the side of law and order and justice, however much for a time it may have been swayed by passion or prejudice, or whatever aberration may have marked its course."

The defense of these laws in these subjects above mentioned, is on the common grounds of necessity and public policy, but the authority for them is found in the power vested in Congress by the Constitution to regulate commerce both with foreign nations and among the several States. This power has been expressly given, and is exclusive, carrying with it whatever is clearly incidental and necessary to its preservation. The whole subject of immigration comes therefore within the exclusive control of the general government. The contract laborers, the Chinese aliens not domiciled here under protection of our laws, and foreigners subject to quarantine on arrival, necessarily fall within the category of immigrants, and although not subjects of commerce in one sense, in another they are amenable to this general authority. In

¹ 109 U. S. 8.

² 140 U. S. 545; 124 U. S. 465; *Barber v. Connolly*, 118 U. S. 27.

³ See *Fong Yue Ting v. U. S.*, 149 U. S. 698.

like manner travellers from one State to another may come within the only restrictions upon interstate commerce which the law recognizes as constitutional, those of the general government.

Some exception has been made in quarantine, and the power of self-defense against persons and things infected or infectious is not taken from the local government, on the general principle that persons and things dangerous from infection, or contamination, from pestilence and disease, are not legitimate subjects of commerce.¹ It was held in *Morgan S. S. Co. v. Louisiana*, that quarantine established by a State is a rightful exercise of the police power, not forbidden by the Constitution of the United States, although some of the rules may amount to regulations of commerce though not so designed. They belong to that class of regulations which States may establish until Congress acts, covering the same ground, or forbidding State laws. For this reason because they are to be viewed principally as commercial regulations, they cannot be considered purely as public laws, but as to their development, intent and effect, we shall find as we examine them in detail, they seem to belong to no other class, and are to be judged alike with these.

Their origin is complex, but if they are to be reasonably maintained their consideration must be as though of police legislation. In other countries this distinction would not arise, and except for the limitations of our national Constitution this anomaly would not exist, and they would come under the ordinary civil administration.

For the furtherance of the act to prohibit the importation and immigration of foreigners and aliens under contract or agreement to perform labor in the United States, other acts were passed. In 1887 and 1888 authority was given to the Secretary of the Treasury, "in case he shall be satisfied that an immigrant has been allowed to land contrary to the prohibition of that law, to cause such immigrant within the period of one year after landing or entry, to be taken into custody and returned to the country from whence he came at the expense of the owner of the importing vessel, or if he entered from an adjoining country, at the expense of the person previously contracting for his services. And, furthermore, the Secretary of the Treasury is authorized "to pay to an informer who furnishes original information that the law has been violated such a share of the penalties recovered as he may deem reasonable and just, not exceeding forty per centum where

¹ *Leisy v. Hardin*, 185 U. S. 100; 118 U. S. 455.

it appears that the recovery was had in consequence of the information thus furnished."

It must be admitted that these methods are somewhat foreign to the historical treatment of this subject of immigration in our country, and difficulties have occurred when an immigrant rejected at one port landed elsewhere, and has entered the country a second time, but for the other territory over land, and a responsible contractor to answer for the expenses was not found. Two reported cases sufficiently illustrate the purpose and obligation of these acts.¹ The *United States v. Craig* cited and approved in the opinion of the United States Supreme Court in the *Church of the Holy Trinity v. United States*. It held that "the Assisted Immigration Act of February 26, 1888, is a constitutional exercise of the power of Congress to regulate commerce with foreign nations. This was an action of debt to recover a penalty of one thousand dollars for the importation of a foreign laborer.

The declaration averred, in substance, that on the 1st day of March 1886, at Point Levi, in the Province of Quebec, the defendant, being a citizen of the United States, entered into an express parol contract with one Joseph Morin, an alien, by which the defendant agreed that, in consideration that Morin would immigrate into the United States, viz., into this district, and perform service for him here for six months at two dollars per day as a ship carpenter, he would prepay the transportation of said Morin from Point Levi to Trenton, in this district, and would also pay him as above stated for his services; that afterward the said defendant did pay the transportation of said Morin, and the latter, in pursuance of said contract, did migrate into the United States, against the form of the statute above set forth. The defendant interposed a general demurrer.

The court said: "This demurrer raises the single question of the constitutionality of what is known as the 'Assisted Immigration Act' of February 26, 1885, the third section of which enacts 'that, for every violation of any of the provisions of the section of this act, the person, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any alien or aliens, foreigner or foreigners, into the United States,' etc., 'to perform labor or service of any kind, under contract or agreement, express or implied, parol or special, with such alien or

¹ Chap. 164, 23 R. S.; *U. S. v. Craig*, 28 Fed. R. 795; *Rector, etc., of the Church of the Holy Trinity v. U. S.*, 143 U. S. 457; vol. 24, U. S. Stat. L., p. 414, Act of February 23, 1887; vol. 25, p. 567.

aliens, foreigner or foreigners, previous to becoming residents or citizens of the United States, shall forfeit and pay for every such offense the sum of one thousand dollars." The contention of the government is, that the act is a valid exercise of the power of Congress "to regulate commerce with foreign nations."

"The extent of this power, and the definition of the word "commerce," were at an early day made the subject of elaborate discussion in the famous case of *Gibbons v. Ogden*, 9 Wheat. 1. The same questions were again discussed in the *Passenger* cases, 7 How. 283, in which was involved the constitutionality of certain State laws, requiring the masters of vessels engaged in foreign commerce to pay a tax upon every passenger brought into the State. It is now settled that the power of Congress under this clause extends, not merely to the regulation of navigation and intercourse, and to the coasting trade and fisheries, within as well as without the State, whenever connected with foreign or interstate commerce, but also to the control and government of seamen of American vessels, to the nationalization of all ships, built and owned in the United States, by registries and enrollments, to the recording of the muniments of title of all American vessels, to the laws of quarantine and pilotage and wrecks of the sea. It extends to the laying of embargoes, as well as to the admission of goods free from duty; to the erection of light-houses, the location of beacons, the removal of all obstructions to navigation upon the navigable waters of the United States; to the designation of ports of entry and delivery; to the offer of bounties by discriminating duties, and by special preference and privileges; and to the erection and control of telegraphic lines. It may encourage or it may entirely prohibit such commerce, and it may regulate, in any way it may see fit, between these two extremes.

"Assuming, then, that the power of regulating commerce extends to every species of intercourse with foreign nations, it is difficult to conceive why Congress may not inhibit the immigration of any class of persons which may seem to it an undesirable addition to the population of the country. Repeated instances of this kind of legislation are to be found in the statutes, and, so far as we know, none of them have been challenged as beyond the constitutional power of Congress. By title 29 (U. S. R. S.), as amended in 1875, citizens of the United States are prohibited from embarking or engaging in what is known as the "Coolie Trade" between the United States and foreign nations, or between foreign nations. By the act of March, 1875, the importation of

women for immoral purposes, and of convicts, is prohibited, and by the subsequent act of August 3, 1882, this inhibition is extended to idiots, lunatics and paupers. By the act of May 6, 1882, the importation of Chinese was suspended for ten years. Punishments are provided for the violation of these acts by fines and penalties upon the persons engaged in the illegal trade, by the forfeiture of their vessels, and by the return of the immigrants to their native countries. In the *Head-money cases*, 112 U. S. 580, many of the prior decisions are reviewed and the power of Congress held to extend to the imposition of a duty of fifty cents upon each immigrant.

"It is claimed however that this act is not a valid exercise of the power of regulating commerce, inasmuch as it forbids the encouragement and solicitation of an act which still continues to be perfectly lawful in itself, viz., the immigration of alien laborers.

"We think this criticism is unfounded. The motives and history of the act are matters of common knowledge. It had become the practice of large capitalists in this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts, by which the employer agreed, upon the one hand to prepay their passage, while upon the other hand, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market, and to reduce other laborers engaged in like occupations to the level of the assisted immigrant. The evil finally became so flagrant, that an appeal was made to Congress for relief by the passage of the act in question, the design of which was to raise the standard of foreign immigrants, and to discountenance the migration of those who had not sufficient means in their own hands, or those of their friends, to pay their passage. While the act is undoubtedly to a certain extent a reversal of the traditional policy of the government, it does not purport to inhibit or discourage the immigration of foreign laborers in general, but only the importation of such laborers under contracts made previous to their migration or importation. It seeks to effect this by declaring (1) that the prepayment of transportation, or the assistance or the encouragement of the migration of aliens or foreigners under contracts to labor in the United States, shall be unlawful; (2) that such contracts made previous to their migration shall be void; (3) that every person or corporation guilty of unlawfully assisting or encouraging the immigration of such laborers shall be subject to a penalty; (4) that the master of any vessel knowingly bringing such

laborers into the country shall be deemed guilty of a misdemeanor. It was undoubtedly competent for Congress to have gone still further, and provided for the return of such laborers to their own country, as was done in the other acts inhibiting the entry of lunatics, paupers and Chinese; but the act is not to be deemed unconstitutional because the legislature has not seen fit to use all the weapons it held in its hands, or apply unnecessarily harsh remedies. Indeed, except in this particular, the act does not differ materially from the other acts upon the same general subject, and is strictly in line with them. In each of them the immigration is directly or indirectly declared to be unlawful, though in none of them is any attempt made to punish the immigrant.

“While this does not declare in express terms that the immigration of foreigners under contracts to labor here shall be deemed unlawful, the whole tenor of the statute indicates this to be its purpose, though the penalty is visited only upon the party who aids and assists the immigrant. But, conceding that the contract only is illegal and void, and the immigration lawful, we know of no principle which forbids Congress from declaring that a certain method for procuring the immigration of foreigners shall be unlawful, and imposing a punishment upon those who adopt that method. While the case is one of considerable public interest, the constitutionality of the act is too clear to require an elaborate consideration.”

2. “The objection that Congress has no power to punish the doing of an act in a foreign country is one which goes rather to the jurisdiction of the court to take cognizance of this offense than to the constitutionality of the act; but as it is one which was urged by counsel, and which must arise in the progress of the case, it may be well to consider it here. By R. S., § 732, “all pecuniary penalties and forfeitures may be sued for and recovered either in the district where they accrue, or in the district where the offender is found.” Hence, if the illegal contract were the sole cause of action in this case, and were made in a foreign country, as is alleged here, and the right of action accrued the moment the contract was entered into, no action would lie under the first clause of this section, in this or any other district. But a careful perusal of the section will demonstrate that the penalty is attached, not to the making of the illegal contract, but to assisting, encouraging or soliciting the migration of the alien to perform labor or service here, knowing that such illegal contract or agreement had been made. To give a right of action under this section three things are essential: (1) The immigrant must first, previous to his becoming

a resident of the United States, have entered into a contract to perform labor or service here. (2) He must have actually migrated or entered into the United States in pursuance of such contract. (3) The defendant must have prepaid his transportation, or otherwise assisted, encouraged or solicited his migration, knowing that he had entered into this illegal contract. So far from the contract being the cause of action, apparently it is not necessary that the defendant should have been a party to the contract at all. But, however that may be, we think that if, after having entered into the contract, the laborer should refuse to carry it out by migrating, the offense would not be complete and the action could not be sustained.

"Admitting that the words "encouraging or soliciting" would seem to indicate an offense in itself, the word "assisting," in the same connection, implies that the immigration shall actually take place before the offender can be held liable, for a person cannot assist in doing that which is never done. In such case the person advising or assisting the immigration could be no more convicted than an accessory before the fact could be, if the crime advised were never committed. Thus in *Respublica v. Roberts*, 1 Dall. 39, the defendant was indicted under a statute declaring that any persons who shall "knowingly and willingly aid or assist any enemies at open war with this State," etc., "by persuading others to enlist for that purpose, shall be adjudged guilty of high treason." The court held that the word "persuading" meant to succeed, and that there must be an actual enlistment of the person persuaded in order to bring the defendant within the intention of the clause."

"There is another class of cases in which the soliciting of a person to commit a crime has been held to be the gist of the offense, and a conviction sustained, though the crime were never committed; but these appear to be limited to cases in which the act solicited is itself a crime. But, however this may be, we think the language of the act, taken together, indicates that the *actual migration of the laborer is a necessary element of the offense*. Now, the act of entering the territory of the United States, or of migrating, in the language of the statute, must be done within some district of the United States; and the question arises whether, assuming that the contract was made and the transportation prepaid, or other assistance given in a foreign country, the completion of the offense within the United States is not sufficient to give our courts jurisdiction. The answer to this question must be in the affirmative. But, again, supposing the offense were only upon

foreign soil, this action would still lie, under the second clause of section 732, if the defendant be "found" within the district. This is a civil action for debt, and it is immaterial where the cause of action arose, unless it is made material by statute. We have no doubt that, under the power to regulate commerce, Congress might make the very offense charged in this declaration, if committed by an American citizen, punishable by indictment, though it were begun and completed in a foreign country. But, as the question does not properly arise in this case, it is useless to discuss it further than to show that criminal jurisdiction is not always limited to offenses committed within the territorial boundaries of the sovereignty."

In the *Trinity Church* case however some construction of the sweeping terms of the statute was found necessary. The Supreme Court held that the statute "does not make it an offense for a religious society in New York to contract with an alien residing in England to remove to New York city and enter into its service as pastor. Among other things which may be considered in determining the intent of the legislature is the title of the act, which may help to interpret its meaning. The title of the act refers to the work of the manual laborer, as distinguished from that of the professional man. Another guide to the meaning of a statute is found in the evil which it is designed to remedy, and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body." Mr. Justice Brewer delivered the opinion¹ of the court and, after reciting the facts, quotes the first section of the statute. "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That from and after the passage of this act it shall be unlawful for any person, company, corporation or partnership, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens,

¹ *Church of the Holy Trinity v. United States*, 143 U. S. 457, and as to interpretation, *Margate Pier Co. v. Hannan*, 3 Barn. & Ald. 266; *State v. Clark*, 29 N. J. L. 96; *U. S. v. Kirby*, 7 Wall. 482; *Oates v. First N. Bank*, 100 U. S. 239; *U. S. v. Fisher*, 2 Cranch, 358, 386; *U. S. v. Palmer*, 3 Wh. 610, 631; *Updegraph v. Com.*, 11 Serg. & R. 894; *People v. Ruggles*, 8 Johns. 290; *Vidal v. Girard*, 2 How. Pr. 198. See chap. XIII, p. 267.

foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories or the District of Columbia." It must be conceded that the act of the corporation is within the letter of the section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words "labor" and "service" both used, but also, as it were, to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added "of any kind;" and further, as noticed by the Circuit judge in his opinion, the fifth section which makes specific exceptions, among them professional actors, artists, lecturers, singers and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section."

"While there is great force in this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. As said in *Plowden*, 205: "From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend to but some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it; and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances." In *Margate Pier Co. v. Hannam, Abbott, C. J.*, quotes from Lord Coke as follows: "Acts of Parliament are to be so construed as no man that is innocent or free from injury or wrong be, by a literal con-

struction, punished or endangered.” In the case of *The State v. Clark* it appeared that an act had been passed making it a misdemeanor to willfully break down a fence in the possession of another person. Clark was indicted under that statute. The defense was that the act of breaking down of the fence, though willful, was in the exercise of a legal right to go upon his own lands. The trial court rejected the testimony offered to sustain the defense, and the Supreme Court held that this ruling was error.

In *United States v. Kirby*, the defendants were indicted for the violation of the act of Congress providing “that if any person shall knowingly and willfully obstruct or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage carrying the same, he shall, upon conviction for such offense, pay a fine not exceeding one hundred dollars.” The defendant Kirby was sheriff of the county, and arrested Farris, a mail carrier, on a bench warrant to answer for murder. The court says: “All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always therefore be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted ‘that whoever drew blood in the streets should be punished with the utmost severity,’ did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire, ‘for he is not to be hanged because he would not stay to be burnt.’ And we think that a like common sense will sanction the ruling we make, that the act of Congress which punishes the obstruction or retarding the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder.”

“It will be seen that words as general as those used in the first section of this act were by that decision limited, and the intent of Congress with respect to the act was gathered partially at least from its title. Now, the title of this act is, ‘An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to

perform labor in the United States, its Territories and the District of Columbia.' Obviously the thought expressed in this reaches only to the work of the manual laborer, as distinguished from that of the professional man. No one reading such a title would suppose that Congress had in its mind any purpose of staying the coming into this country of ministers of the Gospel, or indeed, of any class whose toil is that of the brain. The common understanding of the terms 'labor and laborers' does not include preaching and preachers; and it is to be assumed that words and phrases are used in their ordinary meaning. So whatever of light is thrown upon the statute by the language of the title indicates an exclusion from its penal provisions of all the contracts for the employment of ministers, rectors and pastors. Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the legislative body. The situation which called for this statute was briefly but fully stated by Mr. Justice Brown, when, as district judge, he decided the case of *United States v. Craig*. It appears also from the petitions, and in the testimony presented before the committees of Congress, that it was this cheap unskilled labor which was making the trouble, and the influx of which Congress sought to prevent. It was never suggested that we had in this country a surplus of brain toilers, and least of all, that the market for the service of Christian ministers was depressed by foreign competition. Those were matters to which the attention of Congress, or of the people, was not directed."

"So far then as the evil which was sought to be remedied interprets the statute, it also guides to an exclusion of this contract from the penalties of the act. But beyond all these matters, no purpose of action against religion can be imputed to any legislation, State or nation, because this is a religious people. This is historically true. From the discovery of this continent to the present hour there is a single voice making this affirmation. The commission to Christopher Columbus, prior to his sail westward, is from 'Ferdinand and Isabella, by the grace of God, King and Queen of Castile,' etc., and recites that 'it is hoped that by God's assistance some of the continents and islands in the ocean will be discovered,' etc. The first colonial grant, that made to Sir Walter Raleigh in 1584, was from 'Elizabeth, by the grace of God, of England, Fraunce and Ireland, queene, defender of the faith,' etc.; and the grant authorizing him to enact statutes for

the government of the proposed colony provided that 'they be not against the true Christian faith nowe professed in the church of England.' The first charter of Virginia, granted by King James I. in 1606, after reciting the application of certain parties for a charter, commenced the grant in these words: 'We, greatly commending, and graciously accepting of, their Desires for the Furtherance of so noble a Work, which may, by the Providence of Almighty God, hereafter tend to the glory of his Divine Majesty, in propagating of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring the Infidels and Savages, living in those parts, to human Civility, and to a settled and quiet Government; Do, by these our Letters Patents, graciously accept of, and agree to, their humble and well intended Desires.'

"If we examine the Constitutions of the various States we find in them a constant recognition of religious obligations. Every Constitution of every one of the forty-four States contains language which either directly or by clear implication recognizes a profound reverence for religion, and an assumption that its influence in all human affairs is essential to the well being of the community. There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons; they are organic utterances; they speak the voice of the entire people. While because of a general recognition of this truth the question has seldom been presented to the courts, yet we find that in *Updegraph v. Com.*, it was decided that, 'Christianity, general Christianity, is, and always has been a part of the common law of Pennsylvania.' And in *People v. Ruggles*, Chancellor Kent, the great commentator on American law, speaking as Chief Justice of the Supreme Court of New York, said: 'The people of this State, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice; and to scandalize the author of these doctrines is not only in a religious point of view, extremely impious, but even in respect to the obligations due to society, is a gross violation of decency and good order.'

"Nor are we bound, by any expressions in the Constitution, as some have strangely supposed, either not to punish at all, or to punish indiscriminately, the like attacks upon the religion of Mahomet or of the Grand Lama; and for this plain reason, that the case assumes that we

are a Christian people, and the morality of the country is deeply grafted upon Christianity, and not upon the doctrines or worship of those impostors." "If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth. In the face of all these, shall it be believed that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation?"

It was doubtless necessary that some reservation and limitation of judicial construction should be found for this sweeping statute. The contract of marriage and promise of support has been reported as within its prohibition in the official view of immigration authorities at one or more of our ports. The separation of manual from professional labor, placing the latter beyond the pale, is peculiar to it, but at the same time the reasons for the law are declared to be the ordinary ones, those of public necessity and public policy, and, as it were, for the whole country, without the disturbance of settled relations, or of the rights of alien friends domesticated here under the protection of foreign treaties. It is however on the threshold of the class legislation of which it is an example.

The Chinese Exclusion Acts, and more particularly the last so-called Geary Law, seem to pass these limits, and it is difficult to say where the boundaries are for police laws, when the legislating body has few barriers to recognize, beyond those set up in its own discretion. A very small part of the country desired or was even satisfied with this enactment. Its benefits are local, its disadvantages more widespread and general. It divests from one class of aliens, treaty protection, and the advantages gained by occupation and residence, and involves the right of expulsion or deportation of foreigners. It is only to be sustained as within the powers of Congress to formulate a national rule of public policy governing immigrants, not only on arrival, but continuing this control after their reception in the country, with almost ruthless severity.

Similar laws in separate States have been declared unconstitutional, because affecting commerce. By-laws and ordinances of municipalities, of parallel tenor, have been set aside as incongruous and improper, and not within a reasonable rule of self-defense for a local community, which however in respect to dangers from paupers, convicts, diseased and dangerous persons, or in fear of pestilence, is of supreme authority.

In the opinions of the Justices of the Supreme Court of the United States, in the several cases of Fong Yue Ting, Wong Quan and Lee Joe, published in July, 1893, we may see how far we have come in the extension of police powers, and what limitation of them is possible under Federal laws. It is the province of the student of law while reviewing its history and growth, and examining its adaptation to the questions of the day, as these arise and require adjudication, recognizing the binding force, and the influence on the jurisprudence of his country, of the decisions of the highest courts, yet to keep in mind the principles upon which these must rest, if they are to have enduring effect, and to await awhile that equilibrium of judgment of people, legislature and courts, which settles at last every problem and difficulty. Principles are constant, and they become more and more luminous and distinct, as discussion and experience burn away the coverings of prejudice, of temporary expediency, and of political constraint.

Rarely more important are such reflections than in the consideration of the dissenting opinions in the cases above cited. They mark the slow steps of progress, safer if wisely disputed, and whichever way they may seem to tend, they command attention and respect.

Three writs of *habeas corpus*¹ were granted by the Circuit Court of the United States in New York upon petitions of Chinese laborers arrested and held by the marshal of the district for not having certificates of residence under the sixth section of the act of May 5, 1892.²

¹ Fong Yue Ting, Wong Quan, Lee Joe v. U. S., 149 U. S. 693.

² Act of May 5, chap. 60, 1892. "An act to prohibit the coming of Chinese persons into the United States."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all laws now in force, prohibiting and regulating the coming into this country of Chinese persons, and persons of Chinese descent, are hereby continued in force for a period of ten years from the passage of this act.

"§ 2. That any Chinese person, or person of Chinese descent, when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China, unless he or they shall make it appear to the justice, judge or commissioner before whom he or they are tried, that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country: Provided, that in any case where such other country, of which such Chinese person shall claim to be a citizen or subject, shall demand any tax as a condition of the removal of such person to that country, he or she shall be removed to China.

"§ 3. That any Chinese person, or person of Chinese descent, arrested under the provisions of this act or the acts hereby extended, shall be adjudged to be unlawfully within the United States, unless such person shall establish, by affirmative

The rules and regulations made and promulgated by the Secretary of the Treasury under the seventh section of the act, prescribes for application for certificates of residence, for affidavits in their sup-

proof, to the satisfaction of such justice, judge or commissioner, his lawful rights remain in the United States.

"§ 4. That any such Chinese person, or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be or remain in the United States, shall be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States, as hereinbefore provided.

"§ 5. That after the passage of this act, on an application to any judge or court of the United States in the first instance for a writ of *habeas corpus*, by a Chinese person seeking to land in the United States, to whom that privilege has been denied no bail shall be allowed, and such application shall be heard and determined promptly without unnecessary delay.

"§ 6. And it shall be the duty of all Chinese laborers, within the limits of the United States at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the collector of internal revenue of their respective districts, within one year after the passage of this act, for a certificate of residence; and any Chinese laborer, within the limits of the United States, who shall neglect, fail or refuse to comply with the provisions of this act, or who, after one year from the passage hereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States as hereinbefore provided, unless he shall establish clearly, to the satisfaction of said judge, that by reason of accident, sickness or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of the court, and by at least one credible white witness that he was a resident of the United States at the time of the passage of this act; and if upon the hearing it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost. Should it appear that said Chinaman had procured a certificate which has been lost or destroyed, he shall be detained and judgment suspended a reasonable time to enable him to procure a duplicate from the officer granting it, and in such cases the cost of said arrest and trial shall be in the discretion of the court. And any Chinese person, other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right, may apply for and receive the same without charge.

"§ 7. That immediately after the passage of this act the Secretary of the Treasury shall make such rules and regulations as may be necessary for the efficient execution of this act, and shall prescribe the necessary forms and furnish the necessary blanks to enable collectors of internal revenue to issue the certificates required hereby, and make such provisions that certificates may be procured in localities convenient to the applicants; such certificates shall be issued without charge to the applicant, and shall contain the name, age, local residence and occupation of the applicant, and such other description of the applicant as shall be prescribed by the Secretary of the Treasury; and a duplicate thereof shall be filed in the office of the collector of internal revenue for the district within which such Chinaman makes application.

port, and for the certificates themselves,¹ and also provide for recording duplicates of the certificates in the office of the collector of internal revenue. The petitions alleged that the petitioners were persons of the Chinese race, born in China, and not naturalized citizens of the United States; that they came to the country with the intention of taking up their residence there, one of them as early as in 1879, with no definite intention of returning to China, and for more than a year last past had been residents of the city, county, and State of New York. One never had a certificate of residence, nor applied for it, and was arrested by the marshal without any writ or warrant. The second

“ § 8. That any person who shall knowingly and falsely alter or substitute any name for the name written in such certificate, or forge such certificate, or knowingly utter any forged or fraudulent certificate, or falsely personate any person named in such certificate, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding one thousand dollars, or imprisoned in the penitentiary for a term of not more than five years.

“ § 9. The Secretary of the Treasury may authorize the payment of such compensation in the nature of fees to the collectors of internal revenue, for services performed under the provisions of this act, in addition to salaries now allowed by law, as he shall deem necessary, not exceeding the sum of one dollar for each certificate issued.”

¹ “ Collectors of internal revenue will receive applications on the following form, at their own offices, from such Chinese as are conveniently located thereto, and will cause their deputies to proceed to the towns or cities in their respective divisions, where any considerable number of Chinese are residing, for the purpose of receiving applications. No application will be received later than May 5, 1898.”

“ Collectors and deputies will give such notice, through leading Chinese, or by notices posted in the Chinese quarter of the various localities, as will be sufficient to apprise all Chinese residing in their districts of their readiness to receive applications, and the time and place where they may be made. All applications received by deputies must be forwarded to the collector's office, from whose office all certificates of residence will be issued and sent to the deputy for delivery.”

“ The affidavit of at least one credible witness of good character to the fact of residence and lawful status within the United States, must be furnished with every application. If the applicant is unable to furnish such witness satisfactory to the collector or his deputy, his application will be rejected, unless he shall furnish other proof of his right to remain in the United States, in which case the application, with the proofs presented, shall be forwarded to the commissioner of internal revenue for his decision. The witness must appear before the collector or his deputy, and be fully questioned in regard to his testimony before being sworn.”

“ In all cases of loss or destruction of original certificates of residence, where it can be established to the satisfaction of the collector of the district in which the certificate was issued that such loss or destruction was accidental, and without fault or negligence on the part of the applicant, a duplicate of the original may be issued under the same conditions that governed the original issue.”

petitioner alleged that, without any hearing,¹ he was ordered to be remanded to the custody of the marshal and deported forthwith from the United States, as provided in the act.

The third petition added that the petitioner applied to the collector of internal revenue of the district in which he resided for a certificate which was refused on the ground that the witnesses whom he produced were persons of the Chinese race and not credible witnesses, and he was unable to produce a witness other than a Chinaman who knew and could truthfully swear that he was lawfully within the United States on May 5, 1892, and then entitled to remain. Each petition alleged that the petitioner was arrested and detained without due process of law, and that the sixth section of the act of May 5, 1892, was unconstitutional and void. In each case the Circuit Court, after a hearing upon the writ of *habeas corpus*, and the return of the marshal, dismissed the writ and allowed an appeal, admitting the petitioner to bail pending the appeal.

Mr. Justice Gray delivered the opinion of the Supreme Court, citing former decisions and opinions of the court,² and diplomatic correspond-

¹ In the matter of the arrest and deportation of Wong Quan, a Chinese laborer.

"Wong Quan, a Chinese laborer, having been arrested in the city of New York on the 6th day of May, 1892, and brought before me, a United States judge, by John W. Jacobus, the marshal of the United States in and for the southern district of New York, as being a Chinese laborer found within the jurisdiction of the United States after the expiration of one year from the passage of the act of Congress, approved on the 5th day of May, 1892, and entitled "An act to prohibit the coming of Chinese persons into the United States," without having the certificate of residence required by said act; and the said Wong Quan having failed to clearly establish to my satisfaction that by reason of accident, sickness or other unavoidable cause, he had been unable to procure the said certificate, or that he had procured such certificate, and that the same had been lost or destroyed. Now, on motion of Edward Mitchell, the United States attorney in and for the southern district of New York, it is ordered that the said Wong Quan be, and he hereby is, remanded to the custody of the said John W. Jacobus, the United States marshal in and for the southern district of New York; and it is further ordered that the said Wong Quan be deported from the United States of America in accordance with the provisions of said act of Congress, approved on the 5th day of May, 1892. Dated New York, May 6, 1892. Addison Brown, United States district judge for the southern district of New York."

² *Ekin v. U. S.*, 142 U. S. 651; *Chae Chan Ping v. U. S.*, 130 U. S. 581, 603; *Knox v. Lee*, 79 U. S. 457; 12 Wall. 457, 535; *Wharton International Law Digest* § 206; *Dispatches of Mr. Marcy, Sec. of State, 1856; Dispatches of Mr. Fish, Sec. of State, 1869*; 1 *Vattel Law of Nations*, chap. 19, §§ 230, 231; 2 *Ortolan Diplomatie de la Mer* (4th ed.), chap. 14, § 297, *Bar International L. (Gillespie ed.)* 708, note, 711; 2 *Coke Inst.* 57; 1 *Blackst. Com.* 260; *Chitty Prerog. of Cr.* 49; *Hans Parl. Deb.* (1st series: 441, 445, 471, 1065, 1071, *Re Adam*. 1 *Moore P. C.* 460; 6 *L. Quart R.* 27; *Musgrove v. Chung Teeong Toy*, L. R. App. Cas. 272, 282, 283.

ence of the government, wherein its "power to exclude foreigners from the country whenever in its judgment the public interests require such exclusion, had been asserted in repeated instances and never denied by the executive or legislative departments.

"The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps toward becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country." In 1856 Mr. Marcy wrote: "Every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations, both in peace and war. A memorable example of the exercise of this power in time of peace was the passage of the Alien Law of the United States in the year 1798." In 1869 Mr. Fish wrote: "The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the State, are too clearly within the essential attributes of sovereignty to be seriously contested." The statements of leading commentators on the law of nations are to the same effect. Vattel says: "Every nation has the right to refuse to admit a foreigner into the country, when he cannot enter without putting the nation in evident danger, or doing it a manifest injury. What it owes to itself, the care of its own safety, gives it this right; and in virtue of its natural liberty it belongs to the nation to judge whether its circumstances will or will not justify the admission of the foreigner."

"Thus also it has a right to send them elsewhere, if it has just cause to fear that they will corrupt the manners of the citizens; that they will create religious disturbances, or occasion any other disorder, contrary to the public safety. In a word it has a right, and is even obliged, in this respect, to follow the rules which prudence dictates." Ortolan says: "The government of each State has always the right to compel foreigners who are found within its territory to go away, by having them taken to the frontier. This right is based on the fact that the foreigner, not making part of the nation, his individual reception into the territory is matter of pure permission, of simple tolerance, and creates no obligation. The exercise of this right may be subjected doubtless to certain forms by the domestic laws of each country; but the right exists none the less, universally recognized and put in force. In France no special form is now prescribed in this matter; the exercise of this right of expulsion is wholly left to the executive power."

Phillimore says: "It is a received maxim of international law, that the government of a State may prohibit the entrance of strangers into the country, and may therefore regulate the conditions under which they shall be allowed to remain in it, or may require or compel their departure from it." Bar says: "Banishment and extradition are not to be confounded. The former is simply a question of expediency and humanity, since no State is bound to receive all foreigners, although perhaps to exclude all would be to say good by to the international union of all civilized States; and although in some States such as England, strangers can only be expelled by means of special acts of the legislative power, no State has renounced its right to expel them, as is shown by the alien bills which the government of England has at times used to invest itself with the right of expulsion." "Banishment is regulated by the rules of expediency and humanity, and is a matter for the police of the State."

"No doubt the police can apprehend any foreigner, who refuses to quit the country in spite of authoritative orders to do so, and convey him to the frontier." In the passages just quoted from Gillespie's translation of Bar, "banishment" is evidently used in the sense of expulsion or deportation by the political authority on the ground of expediency, and not in the sense of transportation or exile by way of punishment for crime. Strictly speaking, "transportation," "extradition," and "deportation," although each has the effect of removing a person from the country, are different things, and have different purposes. "Transportation is by way of punishment of one convicted of an offense against the laws of the country. Extradition is the surrender to another country of one accused of an offense against its laws there to be tried and, if found guilty, punished. "Deportation" is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or of those of the country to which he is taken."

"In England, the only question that has ever been made in regard to the power to expel aliens has been whether it could be exercised by the King without the consent of Parliament. It was formerly used by the King, but in later times by Parliament, which passed several acts on the subject between 1793 and 1848. Eminent English judges sitting in judicial committee of the Privy Council have gone very far in supporting the exclusion or expulsion, by the executive authority of

a colony, of aliens having no absolute right to enter its territory or remain therein. In 1837, in a case arising in the Island of Mauritius, which had been conquered by Great Britain from France in 1810, and in which the law of France continued in force, Lord Lyndhurst, Lord Brougham, and Justices Bosanquet and Erskine, although considering it a case of great hardship, sustained the validity of an order of the English Governor, deporting a friendly alien, who had long resided and carried on business in the island, and had enjoyed the privileges and exercised the rights of a person duly domiciled, but who had not, as required by the French law, obtained from the colonial government formal and express authority to establish a domicile there.

“In a recent appeal from a judgment of the Supreme Court of the colony of Victoria, a collector of customs, sued by a Chinese immigrant for preventing him from landing in the colony, had pleaded a justification under the order of a colonial minister claiming to exercise an alleged prerogative of the crown to exclude alien friends, and denied the right of a court of law to examine his action, on the ground that what he had done was an act of State, and the plaintiff had demurred to the plea. Lord Chancellor Halsbury, speaking for himself, for Lord Herschell (now Lord Chancellor), and for other lords, after deciding against the plaintiff on a question of statutory construction, took occasion to observe: “The facts appearing on the record raise, quite apart from the statutes referred to, a grave question as to the plaintiff’s right to maintain the action. He can only do so if he can establish that an alien has a legal right, enforceable by action, to enter British territory. No authority exists for the proposition that an alien has any such right. Circumstances may occur in which the refusal to permit an alien to land, might be such an interference with international comity, as would properly give rise to diplomatic remonstrance from the country of which he was a native; but it is quite another thing to assert that an alien, excluded from any part of her majesty’s dominions by the executive government there, can maintain an action in a British court, and raise such questions as were argued before their lordships on the present appeal—whether the proper officer for giving or refusing access to the country has been duly authorized by his own colonial government; whether the colonial government has received sufficient delegated authority from the crown to exercise the authority, which the crown had a right to exercise through the colonial government if properly communicated to it, and whether the crown has the right, without parliamentary authority, to exclude an alien. Their

lordships cannot assent to the proposition that an alien, refused permission to enter British territory, can, in an action in a British court, compel the decision of such matters as these, involving delicate and difficult constitutional questions affecting the respective rights of the crown and Parliament, and the relations of this country to her self-governing colonies. When once it is admitted, that there is no absolute and unqualified right of action on behalf of an alien refused admission to British territory, their lordships are of opinion that it would be impossible, upon the facts which the demurrer admits, for an alien to maintain an action."

"The right to exclude or to expel all aliens, or any class of aliens absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare, the question now before the court is whether the manner in which Congress has exercised this right, in sections 6 and 7 of the Act of 1892 is consistent with the Constitution. The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective."

"The only government of this country, which other nations recognize or treat with, is the government of the Union; and the only American flag known throughout the world is the flag of the United States. As long ago said by Chief Justice Marshall, and since constantly maintained by this court: "The sound construction of the Constitution must allow to the national legislature that discretion with respect to the means, by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

"Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative

ground. This court disclaims all pretensions to such a power.”¹ The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene. The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power. The power of Congress therefore to expel, like the power to exclude aliens, or any specified class of aliens, from the country may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien’s right to be in the country has been made by Congress to depend. Congress having the right, as it may see fit, to expel aliens of a particular class, or to permit them to remain, has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and to take all proper means to carry out the system which it provides.”

“It is no new thing for the law-making power, acting either through treaties made by the President and Senate, or by the more common method of acts of Congress, to submit the decision of questions, not necessarily of judicial cognizance, either to the final determination of executive officers, or to the decision of such officers in the first instance, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit. For instance, the surrender, pursuant to treaty stipulations, of persons residing or found in this country, and charged with crime in another, may be made by the executive authority of the President alone, when no provision has been made by treaty or by statute for an examination of the case by a judge or magistrate.”

¹ *McCulloch v. Maryland*, 4 Wheat. 316; *Juilliard v. Greenman*, 110 U. S. 421; *Ex parte Yarbrough*, 110 U. S. 651, 658; *Re Rapier*, 143 U. S. 110, 184; *Logan v. U. S.*, 144 U. S. 268.

² Case of Jonathan Robbins, under article 27, Treaty of 1794, with Great Britain; 8 Stat. at L. 129; Wharton St. Tr. 392; 5 Wh. App. 3; *Re Metzger*, 5 How. 176; *Benson v. McMahan*, 127 U. S. 457; *Re Oteiza y Cortes*, 136 U. S. 830; *Cary v. Curtis*, 3 How. 236; *Fielder v. Curtis*, 67 U. S. 461; *Arnson v. Murphy*, 109 U. S. 238; Act of June 10, 1890, chap. 407; *Re Fassett*, 142 U. S. 479; *Den v. Hoboken L. & I. Co.*, 18 How. 272.

"Such was the case of Jonathan Robbins, under article 27 of the treaty with Great Britain of 1794. But provision may be made, as it has been by later acts of Congress, for a preliminary examination before a judge or commissioner; and in such case the sufficiency of the evidence on which he acts cannot be reviewed by any other tribunal, except as permitted by statute. So claims to recover back duties illegally exacted on imports may, if Congress so provides, be finally determined by the Secretary of the Treasury. But Congress may, as it did for long periods, permit them to be tried by suit against the collector of customs. Or it may, as by the existing statutes, provide for their determination by a board of general appraisers, and allow the decisions of that board to be reviewed by the courts in such particulars only as may be prescribed by law. To repeat the careful and weighty words uttered by Mr. Justice Curtis, in delivering a unanimous judgment of this court upon the question what is due process of law: "To avoid misconception upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States as it may deem proper. The court proceeds to examine in detail previous statutes, treaties and decisions on the subject, and states that the right of protection is limited under the acts cited to citizens of the United States." "Chinese persons not born in this country have never been recognized as citizens of the United States, nor authorized to become such under naturalization laws."

In the case of *Chae Chan Ping v. United States*, already often referred to, a Chinese laborer, who had resided in San Francisco from

¹ Act of Congress, July 27, 1868, chap. 249; R. S. 1999, 2001; 15 Stat. at L. 223, 224; R. S., §§ 2165, 2169; Acts of April 14, 1802, chap. 28, May 26, 1824, chap. 188, July 14, 1870, chap. 254, Feb. 18, 1875, chap. 80; *Re Ah Yup*, 5 Sawy. 155; Act of May 6, 1882, chap. 126; Treaty Act, U. S. & China, July 28, 1868, arts. V, VI; 16 Stat. at L. 740; *Chew Heong v. U. S.*, 112 U. S. 536, 542, 543; Treaty, Nov. 17, 1880, arts. I, II, III; 22 Stat. at L. 826; Act of May 6, 1882, chap. 126; *U. S. v. Jung Ah Lung*, 124 U. S. 62; Act of Oct. 1, 1888, chap. 1064; *Foster v. Neilson*, 2 Pet. 353, 314; *Edye v. Robertson*, 112 U. S. 580; *Whitney v. Robertson*, 124 U. S. 190.

1875 until June 2, 1887, when he left that port for China, having in his possession a certificate issued to him on that day by the collector of customs, according to the Act of 1884, and in terms entitling him to return to the United States, returned to the same port on October 8, 1888, and was refused by the collector permission to land, because of the provisions of the Act of October 1, 1888, above cited. It was strongly contended in his behalf that by his residence in the United States for twelve years preceding June 2, 1887, in accordance with the fifth article of the treaty of 1868, he had now a lawful right to be in the United States, and had a vested right to return to the United States, which could not be taken from him by any exercise of mere legislative power by Congress; that he had acquired such a right by contract between him and the United States, by virtue of his acceptance of the offer, contained in the Acts of 1882 and 1884, to every Chinese person then here, if he should leave the country, complying with specified conditions, to permit him to return; that as applied to him, the Act of 1888 was unconstitutional, as being a bill of attainder and an *ex post facto* law; and that the depriving him of his right to return was punishment, which could not be inflicted except by judicial sentence.

The contention was thus summed up at the beginning of the opinion: "The validity of the act is assailed as being, in effect, an expulsion from the country of Chinese laborers, in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of Congress." Yet the court unanimously held that the statute of 1888 was constitutional, and that the action of the collector, in refusing him permission to land, was lawful; and, after the passages already quoted, said: "The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of the government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any consideration of private interest. The exercise of these public trusts is not the subject of barter or contract. Whatever license therefore Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the

United States after their departure, is held at the will of the government, revocable at any time at its pleasure." "The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal and untransferable in their character. "But far different is this case, where a continued suspension of the exercise of a governmental power is insisted upon as a right, because by the favor and consent of the government, it has not heretofore been exerted with respect to the appellant or to the class to which he belongs. Between property rights not affected by the termination or abrogation of a treaty, and expectations of benefits from the continuance of existing legislation, there is as wide a difference as between realization and hopes." By the law of nations, doubtless, aliens residing in a country, with the intention of making it a permanent place of abode, acquire, in one sense, a domicile there; and while they are permitted by the nation to retain such a residence and domicile, are subject to its laws, and may invoke its protection against other nations. This is recognized by those publicists who, as has been seen, maintain in the strongest terms the right of the nation to expel any or all aliens at its pleasure.¹ Chinese laborers therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution and to the protection of the laws, in regard to their rights of person and property, and to their civil and criminal responsibility. But they continue to be aliens, having taken no steps toward becoming citizens, and incapable of becoming such under the naturalization laws, and therefore remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest.

"Nothing inconsistent with these views was decided or suggested by the court in *Chy Lung v. Freeman*, cited for the appellants. For the reasons stated in the earlier part of this opinion, Congress, under the power to exclude or expel aliens, might have directed any Chinese laborer, found in the United States without a certificate of residence, to be removed out of the country by executive officers, without judicial

¹ 1 Vattel L.N., chap. 19, 218; 1 Phil. Int. L., chap. 18, 321; Wharton Int. Law Dig., § 198; *Lau Ow Bew v. U. S.*, 144 U. S. 47; *Re Adam*, 1 Moore P. C. 460; *Chy Lung v. Freeman*, 92 U. S. 275; *Yick Wo v. Hopkins*, 118 U. S. 356.

rial or examination, just as it might have authorized such officers absolutely to prevent his entrance into the country. But Congress has not undertaken to do this. The effect of the provisions of section 6 of the Act of 1892 is that, if a Chinese laborer, after the opportunity afforded him to obtain a certificate of residence within a year, at a convenient place, and without cost, is found without such a certificate, he shall be so far presumed to be not entitled to remain within the United States, that an officer of the customs, or a collector of internal revenue, or a marshal, or a deputy of either, may arrest him, not with a view to imprisonment or punishment, or to his immediate deportation without further inquiry, but in order to take him before a judge for the purpose of a judicial hearing and determination of the only facts which, under the act of Congress, can have a material bearing upon the question, whether he shall be sent out of the country or be permitted to remain. The powers and duties of the executive officers named being ordinarily limited to their own districts, the reasonable inference is that they must take him before a judge within the same judicial district; and such was the course pursued in the cases before us. The designation of the judge, in general terms, as "a United States judge," is an apt and sufficient description of a judge of a court of the United States, and is equivalent to or synonymous with the designation, in other statutes, of the judges authorized to issue writs of *habeas corpus* or warrants to arrest persons accused of crime.

"The provision which puts the burden of proof upon him of rebutting the presumption arising from his having no certificate, as well as the requirement of proof, "by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act," is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the courts of its own government. The competency of all witnesses without regard to their color, to testify in the courts of the United States, rests on acts of Congress, which Congress may at its discretion modify or repeal. The reason for requiring a Chinese alien, claiming the privilege of remaining in the United States, to prove the fact of his residence here, at the time of the passage of the act, "by at least one credible white witness," may have been the experience of Congress, as mentioned by Mr. Justice Field, in the *Chae Chan Ping v. United States*, that the enforcement of former acts, under which the testimony of Chinese persons was admitted to prove similar facts, "was attended with great embarrassment, from the suspicious nature,

in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of the oath." And this requirement, or allowing such a fact to be proved solely by the testimony of aliens in a like situation, or of the same race, is quite analogous to the provision which has existed for seventy-seven years in the naturalization law, by which aliens, applying for naturalization, must prove their residence within the limits and under the jurisdiction of the United States, for five years next preceding, "by the oath or affirmation of citizens of the United States."

"The proceeding before a United States judge, as provided for in section 6 of the Act of 1892, is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country.¹ The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not therefore been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unreasonable punishments, have no application. The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States, being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject. Upon careful consideration of this subject, the only conclusion which appears to us to be consistent with the principles of international law, with the Constitution and laws of the United States, and with the previous decisions of

¹ *Ogden v. Saunders*, 12 Wh. 213; *Pillow v. Roberts*, 18 How. 472; *Baskets of Champagne v. U. S.*, 8 Wall. 114, 143; *Ex parte Fiske*, 113 U. S. 713; *Holmes v. Hunt*, 122 Mass. 505; Act of March 22, 1816, chap. 32; May 24, 1828, chap. 116; U. S. Rev. Stat., § 2165; 2 Kent Com. 65.

his court, is that in each of these cases the judgment of the Circuit Court, dismissing the writ of *habeas corpus*, is right and must be affirmed."

The dissenting opinions of Messrs. Chief Justice Fuller and Justices Field and Brewer, consider the question of the protection of the Constitution extending to Chinese laborers who are lawfully within the United States, and entitled to remain under previous treaties and laws, and the question whether this act of Congress so far as it relates to them is in conflict with that instrument as judicial questions belonging to the judicial department, and that the rights of alien friends affirmed in the case of *Yick Wo v. Hopkins*¹ in this court, are not to be taken away by mere legislation. The Chief Justice says: "While the general government is invested in respect of foreign countries, and their subjects or citizens with the powers necessary to the maintenance of its absolute independence and security throughout its entire territory, it cannot in virtue of any delegated power, or power implied therefrom, or of a supposed inherent sovereignty, arbitrarily deal with persons lawfully within the peace of its dominion. But the act before us is not an act to abrogate or repeal treaties or laws in respect of Chinese laborers entitled to remain in the United States, or to expel them from the country, and no such intent can be imputed to Congress. As to them, registration for the purpose of identification is required, and the deportation denounced for failure to do so is by way of punishment to coerce compliance with that requisition. No euphuism can disguise the character of the act in this regard. It directs the performance of a judicial function in a particular way, and inflicts punishment without a judicial trial. It is in effect, a legislative sentence of banishment, and as such, absolutely void. Moreover, it contains within it the germs of the assertion of an unlimited and arbitrary power in general, incompatible with the immutable principles of justice, inconsistent with the nature of our government, and in conflict with the written Constitution by which that government was created and those principles secured."

In the opinion of Mr. Justice Field it is said: "It does not follow because aliens are not parties to the Constitution, as citizens are parties to it, that whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed, that as they owe on one hand a temporary obedience, they are entitled in return to

¹ *Yick Wo v. Hopkins*, 118 U. S. 366.

their protection and advantage. If aliens had no rights under the Constitution, they might not only be banished, but even capitally punished without a jury or the other incidents to a fair trial. But, so far has a contrary principle been carried in every part of the United States, that except on charges of treason, an alien has, besides all the common privileges, the special one of being tried by a jury of which one-half may be also aliens."

"It is said further, that by the law and practice of nations, aliens may be removed, at discretion, for offenses against the law of nations; that Congress are authorized to define and punish such offenses; and that to be dangerous to the peace of society is, in aliens, one of those offenses. The distinction between alien enemies and alien friends is a clear and conclusive answer to this argument. Alien enemies are under the law of nations, and liable to be punished for offenses against it. Alien friends, except in the single case of public ministers, are under the municipal law, and must be tried and punished according to that law only." The moment any human being from a country at peace with us comes within the jurisdiction of the United States, with their consent—and such consent will always be implied when not expressly withheld, and in the case of the Chinese laborers before us was in terms given by the treaty referred to—he becomes subject to all their laws, is amenable to their punishment and entitled to their protection. Arbitrary and despotic power can no more be exercised over them with reference to their persons and property, than over the persons and property of native-born citizens. They differ only from citizens in that they cannot vote or hold any public office. As men having our common humanity, they are protected by all the guaranties of the Constitution."

"As said by this court, speaking by Mr. Justice Matthews, in *Yick Wo v. Hopkins*: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and view the history of their development, we are constrained to conclude they do not mean to leave room for the play and action of purely personal and arbitrary power. * * * * The fundamental rights to life, liberty and the pursuit of happiness, as individual possessions, are secured by those maxims of constitutional law which are the monuments, showing the victorious progress of the race in securing to man the blessings of civilization under the reign of just and equal laws." What once I had occasion to say of the protection afforded by our government I repeat: "It is certainly something in

which a citizen of the United States may feel a generous pride that the government of his country extends protection to all persons within its jurisdiction, and that every blow aimed at any of them, however humble, come from what quarter it may, 'is caught upon the broad shield of our blessed Constitution and our equal laws.'"¹

"The government of the United States is one of limited and delegated powers. It takes nothing from the usages or the former action of European governments, nor does it take any power by any supposed inherent sovereignty. There is a great deal of confusion in the use of the word "sovereignty" by law writers. Sovereignty or supreme power is in this country vested in the people, and only in the people. By them certain sovereign powers have been delegated to the government of the United States and other sovereign powers reserved to the States or to themselves. This is not a matter of inference and argument, but is the express declaration of the Tenth Amendment to the Constitution, passed to avoid any misinterpretation of the powers of the general government. That amendment declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." When, therefore, power is exercised by Congress, authority for it must be found in express terms in the Constitution, or in the means necessary or proper for the execution of the power expressed. If it cannot be thus found, it does not exist.

"It will be seen by its provisions that the sixth section recognizes the right of certain Chinese laborers to remain in the United States, but to render null that right it declares that if within one year after the passage of the Act any Chinese laborer shall have neglected, failed, or refused to comply with the provisions of the act to obtain a certificate of residence, or shall be found within the jurisdiction of the United States without a certificate of residence, he shall be deemed to be unlawfully within the United States, and may be arrested by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States, unless he shall establish clearly to the satisfaction of the judge that by reason of accident, sickness, or other unavoidable cause he has been unable to secure his certificate, and to the satisfaction of the judge by at least one credible white witness

¹ *Ah Kow v. Nunan*, 5 Sawy. 552-563.

that he was a resident of the United States at the time of the passage of the act."

"His deportation is thus imposed for neglect to obtain a certificate of residence, from which he can only escape by showing his inability to secure it from one of the causes named. That is the punishment for his neglect, and that being of an infamous character, can only be imposed after indictment, trial and conviction. If applied to a citizen, none of the justices of this court would hesitate a moment to pronounce it illegal. Had the punishment been a fine, or any thing else than of an infamous character, it might have been imposed without indictment; but not so now, unless we hold that a foreigner from a country at peace with us, though domiciled by the consent of our government, is withdrawn from all the guaranties of due process of law prescribed by the Constitution, when charged with an offense to which the grave punishment designated is affixed. The punishment is beyond all reason in its severity. It is out of all proportion to the alleged offense. It is cruel and unusual. As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family and business there contracted. The laborer may be seized at a distance from his home, his family and his business, and taken before a judge for his condemnation, without permission to visit his home, see his family, or complete any unfinished business. Mr. Madison well pictures its character in his powerful denunciation of the Alien Law of 1798 in his celebrated report upon the resolutions, from which we have cited, and concludes, as we have seen, that if a banishment of the sort described be not a punishment, and among the severest of punishments, it will be difficult to impose a doom to which the name can be applied. Again, when taken before a United States judge, he is required, in order to avoid the doom declared, to establish clearly to the satisfaction of the judge that by reason of accident, sickness or other unavoidable cause, he was unable to secure his certificate, and that he was a resident of the United States at the time, by at least one credible white witness. Here the government undertakes to exact of the party arrested the testimony of a witness of a particular color, though conclusive and incontestible testimony from others may be adduced. The law might as well have said that unless the laborer should also present a particular person as a witness, who could not be produced, from sickness, absence, or other cause, such as the archbishop of the State, to establish the fact of residence, he should be held to be unlaw-

fully within the United States. I will not pursue the subject further. The decision of the court and the sanction it would give to legislation depriving resident aliens of the guaranties of the Constitution fills me with apprehensions. Those guaranties are of priceless value to every one resident in the country, whether citizen or alien. I cannot but regard the decision as a blow against constitutional liberty, when it declares that Congress has the right to disregard the guaranties of the Constitution intended for the protection of all men, domiciled in the country with the consent of the government, in their rights of person and property. How far will its legislation go? The unnaturalized resident feels it to-day, but if Congress can disregard the guaranties with respect to any one domiciled in the country with its consent, it may disregard the guaranties with respect to naturalized citizens. What answer could the naturalized citizen in that case make to his arrest for deportation, which cannot be urged in behalf of the Chinese laborers of to-day."

"Mr. Justice Brewer adds, that in *Lau Ow Bew v. United States*,¹ this court declared that, "by general international law, foreigners, who have become domiciled in a country other than their own, acquire rights and must discharge duties, in many respects the same, as possessed by and imposed upon the citizens of the country, and no restriction on the footing upon which some persons stand by reason of their domicile is to be presumed." Indeed, there is force in the contention of the counsel for appellants that these persons are "denizens" within the true meaning and spirit of that word as used in the common law. The old definition was this: "A denizen of England" by letters-patent for life, entayl or in fee, whereby he becomes a subject in regard of his person." And, again: "A denizen is an alien born, but who has obtained *ex donatione regis* letters-patent to make him an English subject. A denizen is in a kind of middle state between an alien and a natural-born subject and partakes of both of them." But whatever rights a resident alien might have in any other nation, here he is within the express protection of the Constitution, especially in respect to those guaranties which are declared in the original amendments. It has been repeated so often as to become axiomatic, that this government is one of enumerated and delegated powers, and, as declared in article 10 of the amendments, "the powers not delegated to the United States

¹ *Lau Ow Bew v. U. S.*, 144 U. S. 47.

² *Craw v. Ramsay*, Vaughan, 278; 1 Blk. Com. 874; *Boyd v. U. S.*, 116 U. S. 616. See *The Venus*, 8 Cranch, 253; *Koszta Case*, 2 Whart. Int. L. Dig. 196.

by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It is said that the power here asserted is inherent in sovereignty. This doctrine of power inherent in sovereignty is one both indefinite and dangerous. What are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Where do they obtain the authority for this? Shall they look to the practices of other nations to ascertain the limits? The governments of other nations have elastic powers — ours is fixed and bounded by a written Constitution. The expulsion of a race may be within the inherent power of a despotism. History, before the adoption of this Constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely, as it seems to me, they gave to this government no general power to banish. Banishment may be resorted to as punishment for crime; but among the powers reserved to the people, and not delegated to the government, is that of determining whether whole classes in our midst shall, for no crime but that of their race and birthplace, be driven from our territory. But it needs no citation of authorities to support the proposition that deportation is punishment."

"Every one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment; and that oftentimes most severe and cruel. It is said that these Chinese are entitled, while they remain, to the safeguards of the Constitution and to the protection of the laws, in regard to their rights of person and of property; but that they continue to be aliens, subject to the absolute power of Congress to forcibly remove them. In other words, the guaranties of "life, liberty and property" named in the Constitution are theirs by sufferance and not of right. Of what avail are such guaranties? It is true this statute is directed only against the obnoxious Chinese; but if the power exists, who shall say it will not be exercised to-morrow against other classes and other people? If the guaranties of these amendments can be thus ignored, in order to get rid of this distasteful class, what guaranties have others that a like disregard of their provisions may not be resorted to? "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated

by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to a gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

In the case of Ny Look the Circuit Court,¹ in New York, held that a Chinaman who failed to show one of the prescribed excuses for not having procured a certificate is liable to deportation, although he does show the required residence. As the act, however, never makes provision for actual deportation, nor requires the Chinamen to be imprisoned an indefinite time while awaiting it, the court will, in such cases, order that he be deported whenever provision is made therefor by the proper authority, and that in the meantime he be discharged." The comment made upon this case in the daily press was that the defendant "rode away in the carriage in which he had been brought to court; for while the law specifies the persons by whom he may be arrested, and compels the judge before whom he is taken to order his deportation, it gives nobody authority to do the deporting. It is true that another section of the Geary act provides that any Chinese laborer found after the passage of the bill without a certificate is liable to a year's imprisonment, but no attempt was made to hold him under that section."

Other decisions were subsequently rendered adding new difficulties, and particularly in the case of Jim Lee and three others in the United States Circuit Court in California, and again the right of appeal was conceded.² The government suspended arrests under the Geary Act,

¹ U. S. Cir. Ct. S. D. N. Y. Decision May 26, 1893, Lacombe, J. *In re* N. Y. Look, 56 Fed. R. 81. See Circular May 24, 1893, of the Secretary of the Treasury, requiring collectors to enforce certain sections of the law. In the cases of Ah Sing *et al.*, on appeal to U. S. Sup. Ct. from the U. S. Dist. Ct. N. D. Cal., where the petitioners were sentenced to deportation for failure to register, and were denied a writ of *habeas corpus*, but were allowed an appeal, the appeals were dismissed under the act of November 3, 1893. On motion of appellants' counsel December 19, 1893, the appellants had been released from custody by order of the Department of Justice.

² *In re* Jim Lee, United States Circuit Court, San Francisco, September 11 1893, McKenna and Morrow, JJ. The press says of this decision and of the government: "Matters relating to the Geary Law are more complicated here than ever. Yesterday Judges McKenna and Morrow, in the United States Circuit Court, rendered a decision in the case of Jim Lee and three other Chinese, for whose arrest warrants were asked. The court recited that the United States district attorney had conceded

except so far as this confirmed previous statutes, and announced circular of May 24, 1893, from the Secretary of the Treasury, that known that great numbers of Chinese laborers have entered the United States in violation of the provisions of the earlier laws. Many of these persons have obtained admission upon false representations that they were not laborers but merchants, and others have entered clandestinely from contiguous foreign territory. The Collector of Customs at New York is directed to use all means under his control to vigorously enforce the provisions of law in the first, second, third, fourth and fifth sections of the act, and to take such measures as may be necessary to secure the arrest and prosecution of Chinese laborers who are unable to show that they obtained lawful admission into the United States. Thus the crime of labor is sought to be established, and no surprise can be caused by the judgment of public opinion as given by the journals of the land. "Why such discrimination should be made when the Geary Law, however iniquitous and vicious it may be, is unquestionably law, it is difficult to say. There is of course no legal justification for such a course. It will be most fortunate if the execution of the law can be held in abeyance until its repeal can be secured."

the right of judges to issue such warrants on the complaint of citizens. It was ordered that warrants be issued as prayed, and that to each Chinese be given a separate trial. The last clause is regarded by many as practically rendering the law inoperative. Five Chinese brought here from Los Angeles were to have been deported to-day, but their attorneys, having been denied writs of *habeas corpus*, took an appeal from the order, thus securing a stay of proceedings." Hoo Soo, a Chinese druggist of this city, who located here in 1849, leaves for China on the next steamer with his son and daughter. Both his children were married and had children of their own in this city, San Francisco. "The administration has changed its mind again on the Chinese question, and will await action of Congress before it presses further the deportation of Chinese under the Geary Act. Until the appeal is settled nothing can be done under the law. The bill gives this right of appeal to the Chinese."

CHAPTER XVIII.

NATIONAL QUARANTINE LAW.

Difficulties lay in the way of a National Quarantine in the United States, which need little consideration under a government of original sovereignty. The quarantine laws established by the different States had always been recognized, and the immigration laws had not diminished their effectivity. The Supreme Court had held that the matter is one in which the rules that should govern may in many respects be different in different localities, and for that reason be better understood and more wisely established by local authority.¹ In *Lehigh Valley Railroad v. The Commonwealth of Pennsylvania*, the same court had held that "the grant to Congress of the power to regulate commerce among the States, does not embrace that commerce which is completely internal, or between different parts of the same State. In the carriage of freight and passengers between two points in one State, the mere passage over soil of another State does not render that business foreign which is otherwise domestic." In *Escanaba Company v. Chicago*, the court says: "The commercial power of Congress is exclusive of State authority, only when the subjects upon which it is exercised are national in their character, and admit and require uniformity of regulation, affecting alike all the States. Upon such subjects only that authority can act which can speak for the whole country. Its non action is therefore a declaration that they shall remain free from all regulation. On the other hand, where the subjects on which the power may be exercised are local in their nature and operation, or constitute mere aids to commerce, the authority of the State may be exerted for their regulation and management until Congress interferes and supersedes it." In *New Orleans Gas Company v. Louisiana Light Company*, it was held that "definitions of the police power must however

¹ *Morgan v. Louisiana*, 118 U. S. p. 465; *Lehigh V. R. R. v. Com. Pa.*, 145 U. S. 192; *Escanaba Co. v. Chicago*, 107 U. S. p. 687; *Welton v. State of Missouri*, 91 U. S. 275; *County of Mobile v. Kimball*, 102 U. S. 691; *New Orleans G. Co. v. La. L. Co.*, 115 U. S. 661.

be taken, subject to the condition that the State cannot, in its exercise for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land." The general doctrine was enforced by the decision in *Morgan v. Louisiana* as follows: "It may be conceded that whenever Congress shall undertake to provide for commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a National Board of Health, or to local boards, as may be found expedient, all State laws on the subject will be abrogated, at least so far as the two are inconsistent."¹

At this point the United States may be said to have arrived in the National Quarantine Act of 1893. The causes which led to it we need not here discuss. It is sufficient that the palpable necessity appeared, the public welfare was the only consideration, and public policy brought about the supremacy of the National Quarantine, which would both prevent dangers to the whole country, and avoid, as far as possible, certain unwarrantable encroachments upon commerce and personal liberty, already experienced in one or more localities, which, in the present age of enlightened scientific knowledge and capacity, and broad and liberal administration, could not be permitted to the discretionary action of local office-holders, governed only by their sense of the obligations of their political environment, and without responsibility to the general government." Elsewhere it seemed that mediæval quarantine

¹ *Morgan v. Louisiana*, 118 U. S. p. 464. Act of Congress approved Feb. 15, 1893, entitled an act granting additional quarantine powers and imposing additional duties upon the Marine Hospital Service. The same act in section 9 repeals the National Board of Health Act of 1879.

² It was estimated by the Federal authorities, in 1892, that ninety per cent of all the immigration to this country came through the port of New York, and that the whole United States was affected by the New York quarantine. In respect to new methods of sanitary precaution to accomplish the objects of quarantine, the following description of the system at Liverpool, in 1892, taken from the *Pall Mall Gazette* and the *N. Y. Evening Post* of September 27, 1892, is interesting: "Upon arriving at the railway stations each batch of immigrants is met by the agent of the steamer line by which they are to travel, and given over to the charge of the boarding-house keepers, where the first step is an examination by the doctor. Should he discover or suspect any case of infectious illness, he at once reports to the Medical Officer of Health and the patient is promptly removed to hospital. Not only does the company doctor visit the boarding-houses, but the same thing is done by officers of the Corporation Health Department. In his report for 1891, Dr. J. Stopford Taylor, the medical officer for the port, sanitary authority, spoke of the year as one of great anxiety, owing to the great increase of emigrants passing through the city, "a large proportion being Russian and Polish Jews." But "a constant supervision was kept by the

was about to end, and on the subject of preventive measures against cholera and pestilence, the convention embodying the results of the great sanitary conference at Dresden in the spring of 1893, wherein Austria-Hungary, France, Italy and Russia joined, to which England sent representatives, and approved by commercial States, such as Belgium and the Netherlands, proposed the substitution of combined and moderate measures, compatible with the necessities of international and

inspectors, both by night and by day, over the lodging-houses where they were located. Fortunately, the amount of sickness then was slight, and every assistance was given the medical officer by the keepers of the lodging-houses in removing the patients, as soon as ill, to hospital, and isolating suspicious cases until the nature of the disease could be ascertained." Dr. Taylor is of opinion that Russian and Polish Jews are predisposed to typhus fever, which, indeed, is an indigenous disease among them. "Again, on boarding the steamer, are the emigrants medically examined, and any suspicious case which has escaped detection before, or become suddenly developed, is sent back for treatment and isolation. Thus, in fact, notwithstanding the predisposition to disease, there is but little of it. Sanitary science conquers. The flushing of boarding-houses with clean water and disinfectants is a continuous process, and the like on board the steamers themselves; and such being the precaution in ordinary times adopted, it stands to reason that they shall not be abated at the present juncture; it has simply to be recorded that four cases of cholera, and four only, have occurred at Liverpool, each person having been suffering from infection upon arrival in the city. They were all Russian Jews. Three were treated at the Corporation Infection Hospital at Park Hill; the fourth, through accident, being removed to the work-house at Brownlow Hill. Two died and two recovered; but the contagion was killed. Not another person caught it." At Southampton, England, there was said to be no oppression from quarantine. Articles in the *N. Y. Evening Post*, November 16, 1892, give the data of the methods of protection employed, on the authority of Dr. Harris, the Health Officer of Southampton, and says: "The medical officers, however, were all vigilant, and were ready to stamp out individual cases as soon as they appeared; and in spite of the close proximity of the infected ports, but eight cases of cholera occurred in England during the late epidemic in Europe. There was everywhere manifest a desire to protect private rights as far as possible, and but one vessel was detained for any length of time in an English port. This detention was at Gravesend, and lasted seventeen days. The passengers were promptly removed from the infected vessel; on their arrival in port all passengers were permitted to land and proceed to their destinations when the ship reached port, they being, however, first required to give their names and prospective addresses. Through an active system of telegraphic and other notifications, the Health Officers of the various towns for which these passengers left were apprised of their coming, and for a period of five days, at least, they were visited three times a day by the government physicians. A failure to give the proper address, which, upon several occasions, led to the appearance of cholera, subjected the person offending to a heavy fine. It did not appear that there was any general disinfection of baggage, but, on several occasions, cargoes of food and hay from infected ports were denied admission to English ports. At Grimsby, Dr. Newby promptly had a cargo of fish and fruit thrown overboard from a vessel on which four cases of cholera had developed.

interstate intercourse and commerce, for the haphazard and arbitrary action of individual States and local authorities, moved often by undue apprehension and panic to reckless and destructive action.

Obviously upon subjects connected with immigration, and those stated in the opinion already quoted, "where uniformity of regulation affecting alike all the States is required, only that authority can act which can speak for the whole country." Within its own territory, under sanction of its laws, nothing fails to swift and sufficient protection for all the interests committed to its care. Its intervention was provided for in the laws which organized the Marine Hospital Service and the National Board of Health, and particularly in the legislation of 1878 and 1879.¹ On occasions of necessity, national resources have been used to meet the emergency, especially in the Southern States. In September, 1892, the aid of the administration was again invoked and orders from the President and the Secretaries of the Treasury and the Navy stopped the threatened evils almost at once. From this history we may conclude that this latest law invites a careful study.

1. The radical and at the same time conservative change of authority is to be noticed in the first instance.* By the second and sixth sec-

¹ See acts of Congress, April 29, 1878; June 2, 1879; Feb. 15, 1893, §§ 7, 9. Joint resolutions of Congress, June 14, 1879, authorizing the Secretary of the Navy to place gratuitously at the disposal of the local health officers of any port, for quarantine purposes, such vessels or hulks as are not required for the use of the government. Opinion of Attorney-General, September 1, 1892. Circular of the Treasury Department office of the Supervising Surgeon-General United States Marine Hospital Service, September 1, 1892. U. S. revenue cutters were stationed at Delaware breakwater and at Cape Charles, Va., in aid of quarantine on this coast in 1892.

* An act granting additional quarantine powers and imposing additional duties upon the Marine Hospital Service.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be unlawful for any merchant ship or other vessel from any foreign port or place to enter any port of the United States except in accordance with the provisions of this act and with such rules and regulations of State and municipal health authorities as may be made in pursuance of, or consistent with, this act; and any such vessel which shall enter, or attempt to enter a port of the United States in violation thereof shall forfeit to the United States a sum, to be awarded in the discretion of the court, not exceeding five thousand dollars, which shall be a lien upon said vessel, to be recovered by proceedings in the proper district court of the United States. In all such proceedings the United States district attorney for such district shall appear on behalf of the United States; and all such proceedings shall be conducted in accordance with the rules and laws governing cases of seizure of vessels for violation of the revenue laws of the United States.

"§ 2. That any vessel at any foreign port clearing for any port or place in the United States shall be required to obtain from the consul, vice-consul, or other consular

tions, use of the State and local quarantines is permitted, and by the eighth section equitable compensation is provided, for the use of buildings and apparatus at local stations. 2. In the next place, a procedure is established, which not only necessitates immediate compliance,

officer of the United States at the port of departure, or from the medical officer where such officer has been detailed by the President for that purpose, a bill of health, in duplicate, in the form prescribed by the Secretary of the Treasury, setting forth the sanitary history and condition of said vessel, and that it has in all respects complied with the rules and regulations in such cases prescribed for securing the best sanitary condition of the said vessel, its cargo, passengers and crew; and said consular or medical officer is required, before granting such duplicate bill of health, to be satisfied that the matters and things therein stated are true; and for his services in that behalf he shall be entitled to demand and receive such fees as shall by lawful regulation be allowed, to be accounted for as is required in other cases. The President, in his discretion, is authorized to detail any medical officer of the government to serve in the office of the consul at any foreign port for the purpose of furnishing information and making the inspection and giving the bills of health hereinbefore mentioned. Any vessel clearing and sailing from any such port without such bill of health, and entering any port of the United States, shall forfeit to the United States not more than five thousand dollars, the amount to be determined by the court, which shall be a lien on the same, to be recovered by proceedings in the proper district court of the United States. In all such proceedings the United States district attorney for such district shall appear on behalf of the United States; and all such proceedings shall be conducted in accordance with the rules and laws governing cases of seizure of vessels for violation of the revenue laws of the United States.

"§ 3. That the Supervising Surgeon-General of the Marine Hospital Service shall, immediately after this act takes effect, examine the quarantine regulations of all State and municipal boards of health, and shall, under the direction of the Secretary of the Treasury, co-operate with and aid State and municipal boards of health in the execution and enforcement of the rules and regulations of such boards and in the execution and enforcement of the rules and regulations made by the Secretary of the Treasury to prevent the introduction of contagious or infectious diseases into the United States from foreign countries, and into one State or Territory or the District of Columbia from another State or Territory or the District of Columbia; and all rules and regulations made by the Secretary of the Treasury shall operate uniformly and in no manner discriminate against any port or place; and at such ports and places within the United States as have no quarantine regulations under State or municipal authority, where such regulations are, in the opinion of the Secretary of the Treasury, necessary to prevent the introduction of contagious or infectious diseases into the United States from foreign countries, or into one State or Territory or the District of Columbia from another State or Territory or the District of Columbia, and at such ports and places within the United States where quarantine regulations exist under the authority of the State or municipality, which in the opinion of the Secretary of the Treasury, are not sufficient to prevent the introduction of such diseases into the United States, or into one State or Territory or the District of Columbia from another State or Territory or the District of Columbia, the Secretary of the Treasury shall, if in his judgment it is necessary and proper, make such additional rules and regulations as are necessary to prevent the introduction of such diseases

with the rules and regulations framed and published in pursuance of the provisions of the law, but by the adoption of the precedents governing the clearance and entry of vessels, and the practice in case of seizure of vessels for violations of the revenue laws of the United

into the United States from foreign countries, or into one State or Territory or the District of Columbia from another State or Territory or the District of Columbia; and when said rules and regulations have been made, they shall be promulgated by the Secretary of the Treasury, and enforced by the Sanitary authorities of the States and municipalities, where the State or municipal health authorities will undertake to execute and enforce them; but if the State or municipal authorities shall fail or refuse to enforce said rules and regulations the President shall execute and enforce the same, and adopt such measures as in his judgment shall be necessary to prevent the introduction or spread of such diseases, and may detail or appoint officers for that purpose. The Secretary of the Treasury shall make such rules and regulations as are necessary to be observed by vessels at the port of departure and on the voyage, where such vessels sail from any foreign port or place to any port or place in the United States, to secure the best sanitary condition of such vessel, her cargo, passengers and crew; which shall be published and communicated to and enforced by the consular officers of the United States. None of the penalties herein imposed shall attach to any vessel or owner or officer thereof until a copy of this act, with the rules and regulations made in pursuance thereof, has been posted up in the office of the consul or other consular officer of the United States for ten days, in the port from which said vessel sailed; and the certificate of such consul or consular officer over his official signature shall be competent evidence of such posting in any court of the United States.

"§ 4. That it shall be the duty of the Supervising Surgeon-General of the Marine Hospital Service, under the direction of the Secretary of the Treasury, to perform all the duties in respect to quarantine and quarantine regulations which are provided for by this act, and to obtain information of the sanitary condition of foreign ports and places from which contagious and infectious diseases are or may be imported into the United States, and to this end the consular officer of the United States at such ports and places as shall be designated by the Secretary of the Treasury, shall make to the Secretary of the Treasury weekly reports of the sanitary condition of the ports and places at which they are respectively stationed, according to such forms as the Secretary of the Treasury shall prescribe; and the Secretary of the Treasury shall also obtain, through all sources accessible, including State and municipal authorities throughout the United States, weekly reports of the sanitary condition of ports and places within the United States, and shall prepare, publish, and transmit to collector of customs, and to State and municipal health officers and other sanitarians weekly abstracts of the consular sanitary reports, and other pertinent information received by him, and shall also, as far as he may be able by means of the voluntary co-operation of State and municipal authorities, of public associations, and private persons, procure information relating to the climatic and other conditions affecting the public health, and shall make an annual report of his operation to Congress, with such recommendations as he may deem important to the public interest.

"§ 5. That the Secretary of the Treasury shall from time to time issue to the consular officers of the United States, and to the medical officers serving at any foreign

states, much of the embarrassment from changes in laws affecting shipping and commerce, is avoided. 3. Jurisdiction is given to the United States District Courts, and in all such proceedings the United States district attorney for such district shall appear on behalf of the United States.

The duplicate bills of health, in the form prescribed by the Secretary of the Treasury, setting fourth the sanitary history and condition

port, and otherwise make publicly known, the rules and regulations made by him, to be used and complied with by vessels in foreign ports, for securing the best sanitary conditions of such vessels, their cargoes, passengers and crew, before their departure for any port in the United States, and in the course of the voyage; and all such other rules and regulations as shall be observed in the inspection of the same on the arrival thereof at any quarantine station at the port of destination, and for the disinfection and isolation of the same, and the treatment of cargo and persons on board, so as to prevent the introduction of cholera, yellow fever or other contagious or infectious diseases; and it shall not be lawful for any vessel to enter said port to discharge its cargo, or land its passengers, except upon a certificate of the health officer at such quarantine station, certifying that said rules and regulations have in all respects been observed and complied with, as well on his part as on the part of the said vessel and its master, in respect to the same and to its cargo, passengers and crew; and the master of every such vessel shall produce and deliver to the collector of customs at said port of entry, together with the other papers of the vessel, the said bills of health required to be obtained at the port of departure and the certificate herein required to be obtained from the health officer at the port of entry; and that the bills of health herein prescribed shall be considered as part of the ship's papers, and when duly certified to by the proper consular or other officer of the United States, over to his official signature and seal, shall be accepted as evidence of the statements therein contained in any court of the United States.

"§ 6. That on the arrival of an infected vessel at any port not provided with proper facilities for treatment of the same, the Secretary of the Treasury may remand said vessel, at its own expense, to the nearest national or other quarantine station, where accommodations and appliances are provided for the necessary disinfection and treatment of the vessel, passengers and cargo; and after treatment of any infected vessel at a national quarantine station, and after certificate shall have been given by the United States quarantine officer at said station that the vessel, cargo and passengers are each and all free from infectious disease, or danger of conveying the same, said vessel shall be admitted to entry to any port of the United States named within the certificate. But at any ports where sufficient quarantine provision has been made by State or local authorities, the Secretary of the Treasury may direct vessels bound for said ports to undergo quarantine at said State or local station.

"§ 7. That whenever it shall be shown to the satisfaction of the President that by reason of the existence of cholera or other infectious or contagious diseases in a foreign country there is serious danger of the introduction of the same into the United States, and that notwithstanding the quarantine defense this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce the same is demanded in the interest of the public health, the Presi-

of said vessel, and that it has in all respects complied with the rules and regulations in such case prescribed for securing the best sanitary conditions of the said vessel, its cargo, passengers and crew; which "any vessel at any foreign port, clearing for any port or place in the United States, shall be required to obtain from the consular officer of the United States at the port of departure, or from the medical officer detailed by the President at such port for said purpose, together with a certificate of the health officer at the quarantine station at the port of entry, that the rules and regulations have in all respects been observed and complied with, as well on his part as on the part of the said vessel and its master, in respect to the same, and to its cargo, passengers and crew, are made parts of the ship's papers at the port of entry, and when duly certified shall be accepted as evidence of the statements therein contained, in any court of the United States. Entry therefore is only to be made, when all the information obtained through the provisions of this act has become available, and the necessary precautions have been taken. An infected vessel arriving at any port not provided with proper facilities for treatment of the same, may be remanded at its own expense by the Secretary of the Treasury to the nearest national or other quarantine station, where accommodations and appliances are provided for the necessary disinfection and treatment of the vessel, passengers and cargo, and after certificate shall have been given by the United States quarantine officer, "that the vessel, cargo and passengers are each and all free from infectious disease, and danger of conveying the same, said vessel shall be admitted to entry to any port of the United States named within the certificate." The au-

dent shall have power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate, and for such period of time as he may deem necessary.

"§ 8. That whenever the proper authorities of a State shall surrender to the United States the use of the buildings and disinfecting apparatus at a State quarantine station, the Secretary of the Treasury shall be authorized to receive them, and to pay a reasonable compensation to the State for their use, if, in his opinion, they are necessary to the United States.

"§ 9. That the act entitled "An act to prevent the introduction of infectious or contagious diseases into the United States, and to establish a national board of health," approved March third, eighteen hundred and seventy-nine, be, and the same is hereby repealed. And the Secretary of the Treasury is directed to obtain possession of any property, furniture, books, papers, or records belonging to the United States which are not in the possession of an officer of the United States under the Treasury Department which were formerly in the use of the National Board of Health or any officer or employee thereof." Approved February 15, 1893.

thority of the President to suspend immigration from any country where there is the serious danger described in this law is maintained. This act, although supplemental to former laws, necessarily replaces many of their provisions, and, in express terms, repeals the act of March 3, 1879, entitled "an act to prevent the introduction of infectious or contagious diseases into the United States, and to establish a National Board of Health." The law itself is to be found below in the notes.

It would seem an omission in the law, if considered separately, that the ship alone is regarded as the matter or thing affected by these quarantine regulations, and cargo and passengers embarked have, on arrival at the port of entry, no special recognition, so that individual claims or rights to property or liberty are, as it were, dependent upon the treatment of the ship, or must be sought at large either under the guarantees of the Constitution or of other legislation. At any local station State laws may be appealed to, and the provisions are general, as in the quarantine laws of the State of New York, at least since 1863, that: 1. The decision of the health officer as to the detention of a vessel or cargo shall be rendered within twenty-four hours. 2. "On the arrival of an infected vessel all well persons on board shall have their freedom as soon as possible consistently with the regulations prescribed by or pursuant to law; all such persons shall be immediately transferred to the hospital set apart for their reception, and the vessel unladen, purified and admitted to practice as soon as possible." An appeal to a board of superior officers within twelve hours is also allowed by the State law.

The right to relief from unlawful imprisonment through the instrumentality of the writ of *habeas corpus* has already been discussed. "It is not the creation of any statute, but exists as part of the common law." The writ cannot be abrogated or its efficiency impaired by legislative action, and cases within the relief afforded by the writ at common law cannot under the State Constitution be placed beyond its

¹ Chap. 661, N. Y. Laws 1898, art. 7, §§ 112, 125, 114; chap. 858 N. Y. L. 186, §§ 20-39. In spite of these safe-guards during the cholera panic at New York quarantine in 1892 the steamship *Normania*, from an English port, was treated as a convict vessel, and her contents, including cabin passengers, were "tabooed" in savage fashion, and imprisoned for many days until it was found that not even in this way could the detention be justified.

² *People, ex rel. Tweed, v. Liscomb*, 60 N. Y. 559; *Ex parte Lange*, 18 Wall. 183; *Ex parte Royal*, 117 U. S. 241; *Ex parte Siebold*, 100 U. S. 371. See Chap. VI, notes 2, 3, p. 117.

reach. The various statutes relating to the writ have not been intended to detract from its force, but to add to its efficiency, has been held alike in State and in National courts."

What law or justice require in a particular case, is often an embarrassing question to the court or judicial officer before whom the petitioner is brought, was said by the Supreme Court in *Ex parte Royal*, but the same court held in *Ex parte Lange*¹ that "where a prisoner shows that he is held under a judgment of a Federal court, made without authority of law, the Supreme Court will, by writs of *habeas corpus* and *certiorari*, look into the record so far as to ascertain that fact, and if it is found to be so, will discharge the prisoner, and that the power of the courts of this country over their judgments, orders and decrees cannot be so used as to violate the guaranties of personal rights found in the common law and in the Constitutions of the States and the Union. In many cases already cited, and in the latest decisions under the Chinese Exclusion Acts, and the Geary Law, these principles have been applied to cases of detention, under police laws, and by Federal officers charged with their execution. It cannot be supposed that quarantine or health laws form an exception, and the appeal by *habeas corpus* from the arbitrary discretionary action of a health officer to the judicial discretion vested in judges of the United States still remains for protection against oppression, even though it be in the guise of sanitary measures or a quarantine. Reason must prevail, and in the language of the opinion in the *Lange* case, "there is no more sacred duty of a court than in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied." We have seen in other cases that an unreasonable construction of powers or duties conferred by law upon ministerial officers, will not be upheld by the courts, and that the letter of a statute is not to govern, when the effect is in violation of the spirit of the law, or the intention of the law-makers, and the presumption of the real purpose in view, which is necessarily conclusive, as in the *Church of the Holy Trinity v. The United States* cited in a previous chapter.² The precedents there given

¹ *Ex parte Lange*, 18 Wall. 178.

² *The Church of the Holy Trinity v. United States*, 143 U. S. 457; see chap. XVII, p. 391, note 1; and see, also, *Latter Day Saints v. United States*, 136 U.S. 1; as to the right of the sovereign government as *parens patriae* to supervise the acts of

of the interference of the courts in an unreasonable interpretation of a law are many and varied, both in this country and England, supported by the opinions of great jurists from which quotations are made in the record above mentioned. In a recent well-considered case the Court of Appeals in New York, Mr. Justice Peckham delivering the opinion, holds that where an act required to be performed by a public officer is of a public nature, in the execution of which the public is interested, its performance may be compelled by mandamus sued out upon the relation of any citizen having an interest, as one of the public, in the performance of the act," and says further that it is urged in the case before them, that because the defendants "have met and performed the duty of division and filed their certificate, such action is in its nature judicial, or any rate it is one which requires large discretion in its performance and for these reasons it cannot be reviewed by the courts. Undoubtedly there is a discretion to be exercised in the division by the board, and with the exercise thereof, this court has as little inclination as right to interfere. By the action already taken the relators in these proceedings have been aggrieved. Mandamus is the only remedy in such a case. The court duly interferes to compel the performance (of defendant's duty). What they have done is utterly void and of no effect. We can only interfere so far as to direct them to come together and perform their duty, and make a constitutional division of their county." Such and other legal remedies are open to persons injured, and it would seem that unreasonable, arbitrary and unnecessary oppressive quarantine measures may be controlled, and health officers may be compelled, if necessary, to perform their duty in a lawful and constitutional way.

A wise moderation however has prevailed in the courts to prevent any interference that would militate against the great object of all quarantine measures, that of securing the safety of the population of the country or the district threatened by danger from pestilence or disease. The duty and authority still remain with State administrations to protect their territory, as will be seen in the case of the Minneapolis,¹

public and charitable institutions and of other funds become *bona vacantia* or appropriated to illegal purposes to cause them to be applied in a lawful manner; as to abuse of discretionary power, see chap. XV, p. 347, note 2; *Baird v. Supervisors*, 188 N. Y. 95.

¹ *Minn., St. P. & S. S. M. Ry. Co. v. Milner et al.*, U. S. Cir. Ct., W. D., Mich., N. D., July 29, 1893, 57 Fed. R. 276; Mich. L., act of June 20, 1885, amended April 26, 1893; U. S. Laws, act of Feb. 15, 1893; *Brown v. Maryland*, 12 Wheat. 419-438 *Crutcher v. Kentucky*, 141 U. S. 47; *License Cases*, 5 How. 504-576.

St. P. & S. S. M. Ry. Co. v. Milner et al., decided in the United States Circuit Court of Michigan, July 29, 1893.

This was a bill brought by the railway company against the Michigan State Board of Health to restrain them from enforcing State quarantine regulations, and the hearing was before the United States District Judges Severens and Sage. Passengers on the Canadian Pacific road were detained at a point opposite Sault Ste. Marie, and prohibited from entering the State of Michigan, until they had undergone quarantine detention and their baggage had been disinfected as prescribed in the rules of the State Board of Health. The court says: "The motion for a preliminary injunction will be overruled for the following reasons:

1. In *Brown v. Maryland* Chief Justice Marshall recognized that the removal or destruction of infectious or unsound articles was undoubtedly an exercise of the police power of the State, and an exception to the prohibition resulting from the exclusive power of Congress to regulate the operations of foreign and interstate commerce; and that laws of the United States expressly sanction the health laws of the several States. In the *License cases*, Chief Justice Taney declared that "it must be remembered that disease, pestilence and pauperism, are not subjects of commerce, although sometimes among the attendant evils. They are not things to be regulated and trafficked in, but to be prevented as far as human foresight or human means can guard against them." In *Crutcher v. Kentucky*, Justice Bradley referred to these cases with approval, and stated with great clearness and force the distinction between the exercise of its police power by a State, and an attempt to legislate upon matters of interstate or foreign commerce, which are exclusively within the power of the federal government. These authorities render it unnecessary to refer particularly to the cases cited for the complainant. It is sufficient to say that they all relate to State enactments concerning articles of commerce, and hence are not applicable here. Moreover, the Quarantine Act of Congress, approved February 15, 1893, expressly recognizes the validity of State laws, and in section 3 requires the supervising Surgeon-General of the Marine Hospital service to co-operate with and aid State and municipal Boards of Health in the execution and enforcement of their rules and regulations.

2. We find nothing in any existing treaty with Norway and Sweden in conflict with the institution or enforcement by any one or more of the States of this Union of quarantine regulations.

3. We do not deem it necessary to express an opinion whether the provision of the Michigan statute, making it a misdemeanor to violate

“ the rules of the State Board of Health, adopted in pursuance of the act, is in conflict with the Constitution of Michigan, for we should not, even if we were of opinion that it is unconstitutional, undertake to issue an injunction against criminal prosecution by the State. That the legislature might authorize the board to adopt rules is, we think, beyond question. Such rules are essential to the proper enforcement of the law.

“ 4. As to the objection that passengers from non-infected countries and localities are detained, the answer is, that such detentions are, in the nature of the case, to a certain extent, unavoidable; and passengers from such countries and localities may have become properly subject to detention, by reason of having mingled with others who could communicate pestilence or disease to which they themselves had been exposed or subjected. An opportunity for examination and inspection is indispensable also.

“ 5. The objection that passengers who had certificates from United States inspectors were detained, is not tenable. The States may exercise their police power according to their own discretion, and by means of their own officials and methods. The inconvenience resulting to emigrants and travelers from being halted and subjected to examination and detention at State lines, is of trifling importance at a time when every effort is required, and is being put forth to prevent the introduction and spread of pestilential and communicable diseases. The costs and charges which are incurred in such quarantine inspection may lawfully be imposed on the railway company, as being incident to the business in which it is engaged. The costs of the motion will be taxed to the complainant.”

CHAPTER XIX.

RECENT STATE POLICE LEGISLATION. •

State police legislation has at least kept pace with the national in the advance made in the last few years, but whether equally sustained, or still within its boundaries, it were difficult to judge. It is more varied and may be tried under two constitutions instead of one, that of the Union and that of the State.¹ We have already noticed the anti-truck, labor, holiday, oleomargarine, game, railroad, elevators, buildings, health and liquor laws, and many others discussed in the preceding pages. But a wider range is necessary in the so-called "Stock-Killing Act" of Colorado, or if we are to be bound by the agency law, or the water-shed law, or the construction claimed of the quarantine law of New York State, or the so-called "Dispensary Act" in South Carolina.²

An act was passed by the legislature of New York in 1893 to amend the Penal Code, making it a misdemeanor for any person to carry on or conduct a general mercantile or manufacturing business within the State, as agent or manager for another or others, who shall not within thirty days after the passage of the act, file a sworn statement verified by such agent and principal as to his agency. The effect upon com-

¹ *Yick Wo v. Hopkins*, 118 U. S. 356; *Crowley v. Christensen*, 137 U. S. 86; *Budd v. State of New York*, 143 U. S. 517.

² See N. Y. Laws 1893, chap. 708; *id.*, chap. 189; *id.*, chap. 651, art. 7; South Carolina Statute of Dec. 24, 1892; on Agency Law, see editorial, N. Y. L. Journal, June 5, 1893, with heading, "An act for the oppression of agents;" as to the health law under a similar clause in the law of 1892, chap. 486; *Young v. Flower*, 32 N. Y. Supp. 352; as to S. Ca. law, *Cantini v. Tillman*, U. S. Cir. Ct., S. Ca., 54 Fed. R. 969. This "Dispensary Act" has been held unconstitutional by some of the South Carolina State Courts.

In an opinion rendered Dec. 18, 1893, the U. S. Sup. Ct. declined to pass upon the constitutionality of this law. *In re Swan*, Adv. Ops. No. 5, p. 209; 57 Fed. R. 485.

As to "Stock Killing" acts, see *Wadsworth v. Union P. R. R.*, 33 Pac. R. 514.

There was also a State law passed "to promote the safety of railway employees by compelling the equipment of freight cars with automatic couplers, chap. 544, N. Y. L. 1893,

mission houses selling and making advances on goods is an important consideration. Worthy of attention is the rule of liberty laid down in *People v. Gillson*;¹ the "right of liberty also included the privilege to pursue any lawful trade or occupation free from restraints and criminal penalties not necessary for the public good."

The *parens patriæ* doctrine, or the law of necessity, has not hitherto been understood to lead to the support of a monopoly in a trade or occupation, or the legal conclusion that, because the liquor traffic may be controlled, it may be exclusively carried on by the government, and the reasoning of the court in *Cantini v. Tillman* is read with the greater interest on this account. The effect of the Dispensary Act, as the press has said, is that, in December, 1892, "the State of South Carolina went into the great industry of rum-selling" on its own account. It is an experiment. The gist of the extraordinary act in question is contained in the first two sections, the first prohibiting the manufacture, sale, etc., of any intoxicating liquors within the State, except as otherwise provided; and the second providing that the Governor shall appoint a commissioner (a 'total abstainer'), who, under the regulation of the Board of Control, shall purchase all intoxicating liquors for sale in the State, giving preference to home manufacturers. The immediate supply is to be made through county dispensers alone

¹ *People v. Gillson*, 109 N. Y. 389.

² *Current Topics*, Albany Law Journal, vol. 47, p. 431.

An effective law of somewhat similar import has been in force in Norway and Sweden since 1871, and a law has been proposed in 1893 by a bill prepared by a royal commission, upon a popular demand for it, to extend the control of the "Samlag" system beyond retail sales to all sales of brandy; see Laws of May 3, 1871, and also the preliminary law of Sept. 6, 1845. In Switzerland also by a referendum of September, 1885, an alcohol monopoly was adopted. This "braendevin" includes various kinds of distilled spirits made from potatoes and grain. Two prominent features are to be observed, the working of this law by its own machinery, and the enlistment of local prejudices and self-interest in its favor. The profits are limited to a small percentum less than five, and the surplus of every samlag is distributed to "*objects for the public good*," and thus the communal interests are aided and the communal expenses diminished. No manager of a samlag can appropriate to himself any kind of advantages from liquor traffic, in either purchases or sales, and strict accounts are kept, but "the manager shall on his own account have for sale prepared food, coffee, tea, milk and chocolate." Three effects have been shown by the returns and statistics, taking five-year periods for observation. 1. Reduction in the number of retail places. 2. A moderate advance in the price of brandy, which was very cheap in these countries in 1845. 3. There is less consumption. See a valuable article in three numbers in *The Saturday Review*, S. V., "Alcohol in Norway Seen by Norwegian Eyes," June 10, 17, 24, 1893, vol. 75. The Christiania samlag, established January, 1886, is described more at length in this article.

under county boards of control, who are to take oaths and give bond and may not sell to any person except upon the observance of prescribed formalities." A bill in equity was presented to the United States Circuit Court in the district of South Carolina by Geromio Cantini¹ and another, against Benjamin R. Tillman and W. T. C. Bates, Governor and Treasurer respectively of South Carolina, to enjoin them from carrying out, and executing the provisions of law, relating to the manufacture and sale of intoxicating liquors, passed August 8, 1891, by the State legislature.

The opinion of Mr. Justice Simonton, district judge, states the conclusions to be as follows: "This is a proceeding to test the constitutionality of an act of the General Assembly of South Carolina, commonly known as the 'Dispensary Act.' The purpose of the act, as expressed in its title, is to prohibit the manufacture and sale of intoxicating liquors as a beverage within this State, except as herein provided. There can be no doubt that the purpose thus expressed in this act is lawful." The Supreme Court of the United States, in *Crowley v. Christensen*, say: "By the general concurrence of opinion of every civilized community there are few sources of crime and misery to society equal to the dramshop, where intoxicating liquors in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these liquor saloons than to any other source. The sale of such liquors in this way has, therefore, been at all times by the courts of every State considered as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of a saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day and the days of the week, on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of Federal law. The police power of the State is fully competent to regulate the business, to investigate the evils, or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of the State, or of a citizen of the United States. As it is a business attended with danger to the community, it may, as has been already said, be entirely prohibited, or be permitted under such conditions as will limit to the

¹ *Cantini v. Tillman*, 54 Fed. R. 969; *Crowley v. Christensen*, 187 U. S. 91.

utmost its evils. The manner and extent of regulation rests in the discretion of the governing power. * * * It is a matter of legislative will only."

The act in question, in its first section, declares, "That from and after the 1st day of July, A. D. 1893, the manufacture, sale, barter or exchange, or keeping or offering for sale, barter or exchange, within this State, of any spirituous, malt, vinous, fermented or other intoxicating liquors, or any compound or mixtures thereof, by whatever name called, which will produce intoxication, by any person, business firm, corporation or association, shall be regulated and conducted as provided in this act." As we have seen, this is within the police power of the State, and it is a matter of legislative will only. The general scope and purpose of the act being thus lawful, are any of its provisions in violation of the Constitution of the United States? The proceedings alleged that the act was in violation of, and repugnant to, section 10, article 1, of the Constitution of the United States. This section has numerous provisions. Those which are sought to be applied to this case are the clauses forbidding any State to pass any *ex post facto* law, or law impairing the obligation of contracts, and the provisions forbidding a State, without the consent of Congress, to levy any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. The prohibition as to *ex post facto* laws¹ applies only to crimes. There is no provision of this act open to this objection. The question on the other provisions stated was made before the Supreme Court in *Re Rahrer*. The Supreme Court, after an exhaustive argument, sustained the constitutionality of this act of Congress, and declared that under its operation the law of Kansas was not in conflict with section 10, article 1, of the Constitution."

"Another objection to the act is that it is in violation of section 2, article 4 of the Constitution of the United States, and of the fourteenth amendment, in that this act discriminates both as to persons and products. Section 2, article 4, declares that the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States; and the fourteenth amendment declares that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. But we have seen that the Supreme Court, in *Crowley v. Christensen*, has declared that

¹ *Watson v. Mercer*, 8 Pet. 88; *Railroad Co. v. Nesbit*, 10 How. 395; *Locke v. New Orleans*, 4 Wall. 172; *Carpenter v. Com.*, 17 How. 456; *Re Rahrer*, 140 U. S. 545.

there is no inherent right in a citizen to sell intoxicating liquors retail. It is not a privilege of a citizen of a State, or of a citizen of the United States. In *Mugler v. Kansas*, the court say: "Prior to the adoption of the fourteenth amendment, State enactments regulating or prohibiting the traffic in intoxicating liquors raised no question under the Constitution of the United States. Such legislation was left to the discretion of the respective States, subject to no other limitations than those imposed by their own Constitutions, or by the general principles supposed to limit all legislative power." Referring to the contention that the right to sell intoxicating liquors was secured by the fourteenth amendment, that case says: "So far as such a right exists, it is not one of the rights growing out of citizenship of the United States." In *Beer Co. v. Massachusetts*, it was said that as a measure of police regulation, looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States. And in *Foster v. Kansas*, it is declared to be no longer an open question. All these cases are quoted and reaffirmed in the case of *Mugler v. Kansas*."

The rubric of that case¹ is as follows: "State legislation which prohibits the manufacture of spirituous, malt, vinous, fermented, or other intoxicating liquors within the limits of the State, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege or immunity secured by the Constitution of the United States, or by the amendments thereto.

"The prohibition of the State of Kansas, in its Constitution and laws, of the manufacture or sale within the limits of the State of intoxicating liquors for general use there as a beverage, is fairly adopted to the end of protecting the community against the evils which result from excessive use of ardent spirits, and is not subject to the objection, that under the guise of police regulations, the State is aiming to deprive the citizen of his constitutional rights. Lawful State legislation, in the exercise of the police powers of the State, to prohibit the manufacture and sale within the State of spirituous, malt, vinous, fermented or other intoxicating liquors, to be used as a beverage, may be enforced against persons who at the time happen to own property, whose chief value consists in its fitness for such manufacturing purposes, without

¹ *Mugler v. Kansas*, 123 U. S. 659; *Bartemeyer v. Iowa*, 18 Wall. 129; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Foster v. Kansas*, 113 U. S. 201.

compensating them for the diminution in its value resulting from such prohibitory enactments." The fourteenth amendment is not designed to interfere with the power of the State, sometimes termed its "Police Power," to prescribe regulations to promote health, peace, morals, education and good order of the people.¹ Now every greater includes the less. If the manufacture and sale can be entirely prohibited, they can be prohibited unless certain rules are complied with.

"Another objection to the act is that it is repugnant to the third clause of section 8, article 1, of the Constitution of the United States, giving Congress the power to regulate commerce with foreign nations. We have seen however that by the act of 1890, Congress has expressly recognized and affirmed the right of the States to pass an act like this; and that this act of Congress therefore is a regulation by it of commerce. The last objection, because of the repugnancy to the Constitution of the United States, is that the act is in violation of the fifth amendment, which forbids the taking of property without due process of law, and the taking of private property for public use without just compensation. With regard to this last objection, it is disposed of by two cases from the Supreme Court. In *Transportation Co. v. Chicago*,² "Acts done in the proper exercise of governmental powers, and not directly encroaching on private property, although their consequences may impair its use, do not entitle the owner of such property to compensation from the State or its agents, or give him a right of action." And in *Mugler v. Kansas*, above quoted: "Lawful State legislation, in the exercise of the police power of the State, to prohibit the manufacture and sale within the State of spirituous, malt, vinous, fermented and other intoxicating liquors to be used as a beverage, may be enforced against persons who at the time happen to own property whose chief value consists in its fitness for such manufacturing purposes, without compensating them for the diminution in its value resulting from such prohibitory enactments. A prohibition upon the use of property for purposes declared to be injurious to the health, morals or safety of the community, is not an appropriation of property for the public benefit, in the sense in which the taking of property by the exercise of eminent domain is such taking or appropriation." Is it without due process of law? Every section of this act in which penalties are imposed pro-

¹ *Barbier v. Connolly*, 113 U. S. 27; see *People v. Bd. H.*, 140 N. Y. 1; *Morton v. Mayor*, 140 N. Y. 107.

² *Transportation Co. v. Chicago*, 99 U. S. 635.

vides for a judicial examination and conviction in a court of justice. "Law in its regular course of administration through courts of justice is due process, and when secured by the laws of the State, the constitutional requisition is satisfied. Due process is so secured by law operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of the government, unrestrained by the established principles of private right and distributive justice. Even the destruction of property in the exercise of the police power of the State, when such property is used in the violation of law, in maintaining a public nuisance, is not taking of property for public use, and does not deprive the owner of it without due process of law."

"The complainants object to the act, because it violates the Constitution of South Carolina¹ (sections 21, art. 1), which forbids any *post facto* law, or law impairing the obligation of contracts. This has been disposed of. Because it is repugnant to sections 21 and 20 of the Constitution of South Carolina. Section 21, article 2, requires that every act or resolution shall relate to but one subject, and that shall be expressed in its title. The title of the act is "to prohibit the manufacture or sale of intoxicating liquors as a beverage within this State except as herein provided." I have read the act through carefully, and cannot see how this objection can prevail. Regulating a thing is the prohibition of it, except in accordance with certain rules. This act prohibits the sale and manufacture of intoxicating liquors, except under certain regulations therein provided. Even if upon close examination it should be discovered that one section, the twenty-fifth, is in conflict with the Interstate Commerce Law, and on this point no opinion is expressed, still this would not affect the other sections of the act, and its main scope and purpose, the suppression of sales of intoxicating liquors, except by and through the agency of the State." And it is clear that the rule asked for could not be granted. It is urged on behalf of these complainants that they are Italian subjects, and are protected by the treaty stipulations between Italy and the United States. The language of the treaty on this point is as follows:

"Art. 2. The citizens of each of the high contracting parties shall have liberties to travel in the States and Territories of the other; to carry on trade, wholesale and retail; to hire and occupy houses and

¹ *Caldwell v. Texas*, 187 U. S. 692; *Freeland v. Williams*, 181 id. 406; *Mugler v. Kansas*, 123 U. S. 623; *San Antonio v. Mehafty*, 96 U. S. 812; *Woodson v. Mardock*, 22 Wall. 351.

² *Hills v. Bank*, 105 U. S. 319.

warehouses; to employ agents of their choice; and generally to do any thing incident to or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established.

"Art. 3. The citizens of each of the high contracting parties shall receive in the States and Territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives."

"Under these articles the complainants have the same rights as citizens of the United States. It would be absurd to say that they have greater rights. We have seen that the right to sell intoxicating liquors is not a right inherent in a citizen, and is not one of the privileges of American citizenship; that it is not within the protection of the amendment; that it is within the police power. The police power is a right reserved by the States, and has not been delegated to the general government. In its lawful exercise, the States are absolutely sovereign. Such exercise cannot be affected by any treaty stipulations. "*Salus populi suprema lex.*" There are other and much more grave questions in this case affecting the jurisdiction of this court. The conclusions reached render the discussion of them at this time unnecessary. It is best to come at once to a final decree. Let one be entered, refusing the rule, and dismissing the bill for want of equity."

Injunctions were granted in the State courts against the dispenser in Darlington county, and in other counties, and the constitutional questions raised by the decisions in these cases have not yet been definitely passed upon by the appellate courts.¹ But the illustration of the claims and of the construction of police powers cannot fail of interest.

The United States Supreme Court, *In re Swan*,² declined to enter

¹ On August 18, 1898, it was said in the Herald correspondence from Charleston, S. C., "of course it has not been in force long enough for an accurate opinion to be formed. The law, after one month's trial, finds twenty-four dispensaries established in the thirty-five counties of the State; only fifteen counties contain dispensaries. Nearly half a dozen of those now running have temporary injunctions hanging over them in the (State) Circuit Court and other cases of a similar nature are preparing from one end of the State to the other."

² *In re Swan*, petitioner, U. S. Sup. Ct., Oct. Term, 1898, Adv. Ops. No. 5, p. 209. The opinion states the rule as to appeals in *habeas corpus* and that judgments of courts, whether Federal or State, may not be attached collaterally therein, but also finds that: "Under the Dispensary Act of South Carolina a constable is not authorized

upon an examination of the constitutionality of the act, partly on the ground that "*habeas corpus* is not to be used as a writ of error."

This right of a State to engage immediately in trade on its own account, claimed under the South Carolina Dispensary Law, principally on moral grounds, which however may find some support in the public charge of roads, bridges, ferries and canals, was asserted in a recent act of Minnesota in a new direction, and as the Supreme Court of that State has found, unlawfully and to an extreme.¹ It provided for the building and maintaining, at the charge of the State, under the management of the Board of Railway and Warehouse Commissioners, a warehouse and elevator of a total capacity of one million five hundred thousand bushels of grain in Duluth harbor on St. Louis bay.

These commissioners were to appoint a suitable person as warehouseman "of said State elevator or warehouse," and such assistants as are necessary, and adopt such rules and regulations for the receiving, handling, storing and delivering grain as they shall deem proper, with power, in case they think that any person or combination of persons is seeking "to monopolize said elevator," to adopt rules limiting the amount of grain which any one person, combination or corporation may have in the elevator at any one time. They are also required to fix the charges for storing, inspecting, weighing and handling grain, including the cost of receiving and delivering, which charges are to be a lien on the grain so received, and, when collected, to be paid into the State treasury to the credit of the grain and warehouse fund. The elevator is to be "cleaned and measured up" once each year to ascertain whether there is any gain or loss by the system of dockage. In connection with their other duties in managing and operating this elevator, the commissioners are to keep on file, for public inspection, publications showing the market price of grain and farm products in certain specified leading markets of this country and Europe; also, the freight rates to such markets by the different means of transportation; also, to publish a weekly bulletin showing the prices paid in said markets for farm products, and the rates of freight between Duluth and Minneapolis and

to seize, without a warrant or judicial action, intoxicating liquors in the possession of a receiver appointed by the U. S. Circuit Court.

¹ L. Minn., chap. 30, 1898; *Rippe v. Becker*, 57 N. W. R. 331; see *Waterloo Woolen Man. Co. v. Shannahan*, 123 N. Y. 345; *Booth v. Town of Woodbury*, 32 Conn. 118; *Norman v. Kentucky Bd. Man. W. C. Ex.*, 20 S. W. R. 901; *People v. Budd*, 117 N. Y. 1; see *Greenfield v. Gilman*, 140 N. Y. 163; *Cote v. Murphy*, 28 Atl. R. 190.

said markets, said bulletin to be kept on file "in said institution," and in the office of the commissioners in St. Paul, and also to be furnished by mail to all persons who may order the same, at a price to be fixed by the commissioners, not exceeding one dollar per annum. The commissioners are also to send samples of grain being exported to the various leading markets of the world, "for inspection and to secure prices as to their market value," that they may know whether the markets of Minnesota are within a reasonable difference in price of the markets of the world. Said commission shall have power to purchase and export a quantity of grain to any of said markets, if they deem such course advisable, in order to ascertain the facts in the case; it being the intention of this act to prevent monopolization and unjust control of the markets of the State for farm products."

The evident sole purpose of the act is to provide for the State erecting an elevator, and itself going into the grain elevator business, and demonstrates that the statute in question is repugnant to an express provision of the Minnesota Constitution, that "the State shall never contract any debts for works of internal improvement, or be a party in carrying out such works." The historical review by the court of the motives that led to such constitutional inhibition in Minnesota and other States has a large application and determines the decision made that "the authority in a State to regulate a given traffic or trade, under the police power, does not involve and imply the right in the State to engage in such traffic or trade itself." The court says that "the police power of a State to regulate a business does not include the power to engage in carrying it on. * * * The right of the State to embark in the construction and operation of these works cannot be predicated on the police power." The distinction in cases is obvious, says a recent writer, contrasting this law with the Dispensary Act. "Under the police power the State of South Carolina might regulate the carrying on of the liquor traffic by private enterprise, or might even go as far as to prohibit it altogether, but he questions whether such power can at once be stretched to the extent of authorizing an enterprise of ordinary business to be carried on exclusively by the State.

In *Wadsworth v. Union Pacific Railroad* the Supreme Court of Colorado in May, 1893, limited the legislative power in the regulation of penalties upon railroads in a stock killing law, on the ground that in the sections criticised and overruled "their operation might result in

denying a railway company the equal protection of the laws and depriving it of its property without the process of law.”¹

The law required payment, and apparently without defense or protection of any kind, for any animal injured by any engine or engine car or cars, and for many animals a fixed price was made by the law. If no price is fixed, “the owner or agent of such stock, after the filing as aforesaid of an affidavit of ownership, which affidavit shall contain a statement of class, grade and value of such animal, shall select some disinterested freeholder of the county where such killing took place and shall notify such company or corporation of said selection;” the corporation shall choose an appraiser and the two a third; and a majority shall be sufficient to determine the appraisal which shall be certified under oath. If the corporation make no appointment the nearest justice of the peace shall select three appraisers. The costs and amount of appraisal are to be paid by the railroad company in thirty days, or the company will be liable to pay double, with reasonable attorneys fees, etc. An exception is made of the “stock getting through gateways,” made by the railroad at the request and for the accommodation of the complainant, unless the injury was occasioned by the fault of the railroad company.

The court said, in part: “Stock-killing statutes similar to our own have been considered and held unconstitutional in several States. The Court of Appeals of this State has also expressed a like opinion. These decisions have been placed upon various grounds. The statute in question was obviously intended to be remedial as well as penal. The statute cannot be sustained upon the ground that it is penal. It lacks an essential element of a penal statute, in that it permits the penalty to be visited upon a party not guilty of doing any thing prohibited, or of violating any duty imposed by law. The statute cannot be classed as merely remedial, nor as a statute of indemnity, in that it fixes the amount to be paid for certain kinds of animals by an arbitrary schedule of prices, without allowing proof of their actual value. As to other kinds of animals, also, it provides for fixing their value by appraisers, without allowing proof of their real value, and in a certain contingency the value may be fixed by a proceeding wholly *ex parte*.

“It is no answer to these objections that the schedule of prices may be reasonable, or that railroad companies may join in the appraisalment

¹ Wadsworth v. Union P. R. R., 35 Pac. R. 515; Colo. L. 1885, p. 304, amending Gen. Stat. Colo., 1883, chap. 93, §§ 13, 14.

proceedings. A statute cannot be considered merely remedial or compensatory, which compels a party to pay for property destroyed without allowing him to produce evidence of its value. It is true the statute says "no railroad company shall at any time be required to pay more than the market value of any animal killed or damaged; but nowhere in the statute is there any provision for an ascertainment of such value by evidence, or by the usual mode of hearing and trial, or by any mode of actual trial. The statute not only makes a railroad company unconditionally liable for any domestic animal it may kill or damage, but it deprives the company of the mode of trial afforded to other litigants in like cases. By the terms of the statute, when the value of an animal is fixed by the schedule, neither party can vary the same; in the appraisement of other animals neither party can be heard by witness or counsel. This would seem to bear equally against both parties, but it does not. The remedy of the statute being cumulative, the owner of animals killed or damaged may resort to the statute, or he may rely upon his common law action, as was held in the Henderson case. But when the owner resorts to the statute there is no alternative for the railroad company, if the statute be upheld. In these respects the statute denies to railroad companies the equal protection of the laws. It provides that they may be subjected to liability and to a judgment without opportunity for hearing or trial according to the law of the land, and thus they may be deprived of their property without due process of law. Such a statute cannot be upheld as constitutional. In this connection the language of Mr. Webster is most appropriate: "By the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds from inquiry, and renders judgment only after trial."

"The legitimate basis for exclusive State control of any industry or trade, as a legitimate means to secure the safety of the people and their property, was passed upon by the Supreme Court of Indiana in September, 1893, in *Lewisville Natural Gas Company v. State, ex rel. Reynolds*, in respect to a city ordinance regulating the price of natural gas under a State law in Indiana, enacting "the board of trustees in towns, and common councils of cities in this State, shall have power to

¹ Potter, Dwar. St. 74; Suth. St. Const., §§ 206, 359, 399; Const. U. S., art. 14; Const. Colo., art. 2, § 25; Cooley Const. Lim. (6th ed.), 431; *East Kingston v. Towle*, 48 N. H. 65; *County of San Mateo v. Southern Pac. R. Co.*, 8 Amer. and Eng. Ry. Cas. 1; *Railway Co. v. Outcalt*, Colo. App. 31, Pac. R. 177; *Graves v. Railroad Co.*, 5 Mont. 556; 6 Pac. R. 16; *Dacres v. Navigation Co.* (Wash.), 20 Pac. R. 601.

provide by ordinance reasonable regulations for the safe supply, distribution and consumption of natural gas within the respective limits of such towns and cities, and to require persons or companies to whom the privilege of using the streets and alleys in such towns and cities is granted for the supply and distribution of such gas to pay a reasonable license for such franchise and privilege."¹

It was decided that municipal corporations have not such power either at common law or by statute. The opinion states: "The court take judicial notice of the fact that natural gas is in a high degree inflammable and explosive, and so dangerous that its use may be made the subject of police regulation. As the public safety is always the highest consideration in all legislation, it is fair to presume that when the act under discussion was passed, the General Assembly had in view the safety of the people of the State. Some police regulation in the localities in which natural gas was to be used, in order to secure the safety of the people and their property, was an absolute necessity. There is not a word or syllable to be found in the act indicating that the General Assembly had in view any other purpose than that of securing the safe supply and use of natural gas. To secure the safe supply and use of natural gas is one thing, and to fix the price at which gas shall be supplied is another and quite a different thing. In our opinion, it was not the intention of the General Assembly to confer, by the act above set out, the power to regulate the price at which natural gas should be furnished. It follows that the conclusion reached in the case of *City of Rushville v. Rushville Natural Gas Company*, *supra*, was erroneous and should be overruled. The trustees of the town of Lewisville having no power to regulate the price at which natural gas should be furnished, the ordinance in question purporting to do so, is void upon its face, and the Circuit Court for that reason erred in overruling the demurrer to the complaint."

A more curious and it would seem perplexing problem respecting local quarantine and its domination, under a plea of overwhelming necessity, is presented in *Young v. Flower*,² in the New York Supreme Court, in February, 1893. The court adopts the argument of the

¹ *Laws of Indiana*, March 7, 1887; *Elliott Sup.*, § 800; *Louisville N. G. Co. v. State, ex rel.*, *Reynolds*, 34 N. E. R. 70; see *Rushville v. Rushville N. G. Co.*, 133 Ind. 575, 28 N. E. R. 853; *Bd. of Comrs. of Fountain Co. v. Bd. of Comrs. of Warren Co.*, 128 Ind. 295; *Jameson v. Oil Co.*, 128 Ind. 555.

² *Young v. Flower*, 23 N. Y. Sup. 232; *Laws of N. Y.* 1892, chap. 486; see *Board of Health (of Yonkers) v. Copcutt*, 140 N. Y. 12; *Minn., St. P., etc., R. Co. v. Milner*, 57 Fed. R. 276.

urgency found for some temporary expedients used, it was said, for the benefit of the State. The *salus populi* doctrine once more is offered as an explanation, which may defend a principle, though perhaps unable to support the particular instance. As the court says, "this litigation presents only the question of the right to land passengers at the particular time it was done in September last."

The action was brought by William H. Young and others composing the Board of Health of Islip against Roswell P. Flower, William T. Jenkins and others, for an injunction to restrain the landing of persons infected with cholera on Fire Island, which was within the limits and jurisdiction of the town of Islip in Suffolk county and of its Board of Health. The defendants claimed the right to have persons detained in quarantine in the port and county of New York transferred to Fire Island in violation of the orders of the local Board of Health, under the orders of the health officer of the port of New York, who assumed to control both his own station and a new one located by him in this other county of Suffolk. The statute construed by the court, containing the following provisions which are referred to: "There shall continue to be a health officer *for the port of New York* appointed by the Governor," etc., etc. "He shall have general supervision and control of the quarantine establishment, and the care and treatment of the sick thereat, and shall carry into effect the provisions of this article. He shall, in the presence of immediate danger, take the responsibility of applying such additional measures as may be deemed indispensable for the protection of the public health." It was under this last clause that the court sustained this extra territorial action, but endeavored to avoid the effect of the decision as a precedent, and so far it has not been subjected to review. The facts of this interesting discussion in the case of local quarantine versus local quarantine are sufficiently set out in the opinion.

It is a Special Term decision, but the emergency which is its supposed reason passed so soon, that another adjudication on parallel lines or even a satisfying appeal would not be probable. The prayer for relief was as follows: "That the defendants be enjoined from bringing to the Surf Hotel (Fire Island,) any person, baggage, clothing, or any other thing the subject of quarantine, brought from any vessel or quarantine station or elsewhere, or any person, matter, or thing infected, or supposed likely to be infected with cholera or from using said Surf Hotel for quarantine purposes. A preliminary injunction was obtained on September 12, 1892, from a single judge at Special

Term, but was vacated by the General Term on September 13, 1892 upon the ground that there was no power vested in a single judge to issue an injunction against a State officer. Code, section 605. The defendant Flower is the Governor of the State; the defendant Jencks is the health officer of the port of New York. The plaintiffs found their rights to the relief demanded upon the supposition that they, as the Board of Health of Suffolk county, had a right to legislate respecting matters affecting the public health within their county; and particularly they claim that they had a right to make the order of September 10, 1892, which, in substance, forbids the landing of passengers from cholera infected ships arriving at the port of New York at Fire Island, which is within their jurisdiction; and secondly, upon the theory that quarantine must be exclusively maintained by such health officer "in the lower bay of New York, not on Staten Island, not on Coney Island, and not on Long Island." On the 10th day of September, 1892, the plaintiff board made the order referred to, and recited, among other things, that the landing of such passengers would be dangerous to life and health, and to the public health and safety within the town of Islip, and thereupon they formulated a resolution "prohibiting such landing under a penalty of \$100 for every passenger so landed, and authorized the chairman of the board to appoint fifty special sanitary policemen with full power to prevent by all legal means such landing." The two theories upon which the plaintiffs predicate their right to maintain this action were challenged by the defendants, and they justified their action by the powers given by chapter 486, Laws of 1892. For the purpose of simplifying the trial, every fact deemed necessary for the consideration of the court was agreed upon.

CULLEN, J. "I think that the plaintiffs can maintain this action if the defendants' acts are without authority of law. The contention that plaintiffs' power to guard against the introduction of contagious and infectious diseases is limited to the isolation and control of infected persons or things after they come within the town, but is insufficient to prevent the bringing of such persons or things within the town, proceeds on a very technical and, to me, unsound interpretation of the statute. The order made by the plaintiffs was therefore, as to its general character, within the scope of their authority, and its validity must be tested by the powers conferred by statute on the defendant, the Health Officer of the port of New York. That the general scheme of the quarantine law for the port of New York not only contemplates that the hospital structures, buildings, and wharves for quarantine pur-

ses shall be located only in the lower bay of New York, and not on the adjoining lands of Staten Island, Long Island, or Coney Island, it forbids the acquisition of land as a site for such purposes in any other place, is not only clearly apparent from the statute itself, but was expressly decided by this court in *Segnine v. Schultz*, Barnard, J., presiding. That decision would be controlling on me if I had any doubt as to the proper construction of the law, but in that decision I entirely concur. That the detention of persons who may have been subject to infection from contagious diseases is a part of the quarantine system to the same extent as the isolation and care of those actually ill with such disease, was also decided in the case cited."

"The only proper authority for the detention of such persons is that it is a part of the quarantine. I am entirely clear that there is no power in the quarantine officers to locate any part of the permanent quarantine establishment within Suffolk county, but this view does not control the disposition of the present case. By the existing law (chapter 486, Laws of 1892), the general administration of the quarantine establishment of the port of New York is vested in the Health Officer. By section 13, article 2, of the statute cited, it is provided that "he shall, in the presence of immediate danger, take the responsibility of applying such additional measures as may be deemed indispensable for the protection of the public health." I agree with the contention of the plaintiffs' counsel that such a power granted in general terms must be exercised — First, within the territorial limits of the jurisdiction of such officer; and, second, that the emergency must actually exist, of which the officer is not to be the sole judge; and that the act done or power sought to be exercised must be fairly and reasonably appropriate for the emergency that has arisen. But the power existing by common law in even private individuals in the case of impending calamity from a pestilence or fire is great.

"In *Russell v. Mayor*, it is said: "The best elementary writers lay down the principle, and adjudications have for centuries sustained, sanctioned and upheld it, that in case of actual necessity to prevent the spreading of a fire, the ravages of a pestilence, or any other great public calamity, the private property of any individual may be lawfully destroyed for the relief, protection or safety of the many, without subjecting the actors to personal responsibility for the damages sustained." In fact there is no liability even in the public to indemnify the owner of property for such destruction, except as created by statute."

"Legislation has now largely, if not wholly, removed this right from private individuals and intrusted it to public officers, and also provided for compensation from the public treasury, so that one may not suffer without indemnity for the relief of the many. I refer to the extent of the natural right of the community to show that the power, when intrusted to a public officer, should not be construed as limited by too narrow bounds.¹ It seems to me that an emergency had fairly occurred within the meaning of the statute. So many vessels had arrived from ports infected with cholera, that the hospital accommodations of the quarantine establishment had become inadequate to receive people sick from the disease and those who had been exposed to danger. This is conceded by the agreed statement of facts. Persons who had been subjected to the influence of contagion had therefore to be either detained on the infected ships, or other ships be obtained as a place for their detention, or it was necessary to land and isolate them at some other point than that provided by the statute for permanent quarantine purposes. Certainly, not only a regard for the lives and health of such passengers themselves, but regard for public health, required that such persons should not unnecessarily be longer subjected to the danger of contagion. The question between vessels and a landing-place, was a fair subject for the exercise of discretion by the Health Officer, and the statement of facts does not show that the officer had any vessels available for the purpose of floating hospitals, or places of detention, other than one steamboat."

"It seems to me that in the contingency that had actually arisen, the Health Officer was justified in securing some appropriate site for the temporary landing and isolation of these passengers, and I cannot say that the site selected was inappropriate. Several sites were presented. Each had advantages and each was subject to disadvantages, and it was for the Health Officer to determine which was preferable. If the hospitals of the quarantine should take fire, surely the Health Officer might land their occupants. Here the emergency was not so great or immediate as the one suggested, but still I think it was real and substantial. All this proceeds on the theory that the Health Officer acted within his territorial jurisdiction, for an emergency as to a matter of public health occurring in one town or county would not, without legislative authority, authorize the local authorities to enter within the limits of another

¹ *Seguine v. Schultz*, 31 How. Pr. 398; N. Y. Laws 1892, chap. 486; *Russell v. Mayor*, 2 Denio, 474; *Mayor v. Lord*, 17 Wend. 285; see 140 N. Y. 1; *id.* 207; 139 N. Y. 495; 57 Fed. R. 276; L. R., 4 Ch. App. 146; see *supra*, p. 221.

town or county; otherwise I fear many localities would be disposed to impose their hospitals or post-houses upon their neighbors."

"In the case of *People v. Platt*, the defendant was ousted from the office of commissioner of quarantine on the ground of his residence in the county of Tioga. The decision did not however proceed on the ground that the office was a local one, but because the office was statutory, and it was within the power of the legislature to prescribe the conditions of eligibility to its enjoyment, the statute providing that such officers should be residents of the metropolitan police district. In *Ferguson v. Ross*, it was decided that an act to prevent the deposit of carrion, dredged materials, etc., in New York bay and the North and East rivers, was not local, but general. I think that, under the principle thus declared, the Health Officer must be considered a State officer.¹

"This was the view entertained by the General Term of this court when it vacated the preliminary injunction granted in this action. Hence, if, under the stress of exigency, the Health Officer could, in the disposition of persons suffering from disease, or subject to contagion, go at all beyond the express area provided for that purpose by the statute, he could go to Suffolk county as well as to any other portion of the State. This view does not authorize the quarantine authorities to hold Fire Island as an annex to, or for the overflow of, the quarantine establishment of the port of New York. This would plainly be illegal under the existing statute. If the probability of the recurrence of the condition existing last fall can be foreseen, it is the duty of such authorities, under the existing law, to increase the local quarantine establishment so that it will meet the demands that may be imposed on it. But this litigation presents only the question of the right to land passengers at the particular time it was done,—in Septem-

¹ *People v. Platt*, 117 N. Y. 159; 23 N. E. R. 937; *Ferguson v. Ross*, 126 N. Y. 459; 27 N. E. R. 954. The Health Officer for the port of New York is not a State officer named in the Constitution. His appointment is similar to that of the former port wardens and harbor masters, and notaries public. Sheriffs, county clerks and district attorneys may be removed by the Governor, and appointments to their offices during vacancies, until the next period for filling the same, made by the Governor. Except as made by law *ex-officio* member of the New York Board of Health, the Health Officer of the port has been granted and exercises no powers in the city proper, and none in Brooklyn. This judicial recognition seems to be "*in partibus*." *Ferguson v. Ross*, above cited, holds only that "a law having for its object the protection of the navigation in the harbor of New York is, we think, general and not local. The act is limited territorially, but the subject is both public and general."

ber last. For the reasons given, I think this act was in the power of the Health Officer, and the complaint should be dismissed."

Encroachments upon the rights of voters have been complained of in several States. Under a Massachusetts law,¹ a petition was presented to the Supreme Judicial Court of Massachusetts, in June, 1880, in the case of *Stone v. Smith and others*, registrars of voters for mandamus against the Board of Registrars for the city of Lynn, for cause of a refusal to enter the petitioner's name on the voting list. It was held that a statute of the State, providing that certain persons, before registering for election purposes, must read from the official edition of the Constitution, and write their names, is not in violation of the fourteenth amendment of the Constitution. The court said: "It is well known that many of the States have, from time to time, by an impartial and uniform rule of prohibition, denied the right to vote to such of their male inhabitants as were thought not to possess the qualifications necessary for an independent and intelligent exercise of the right. Article 15 of the Constitution of the United States provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race or color, or previous condition of servitude. This is the only prohibition on the States contained in the Constitution of the United States which concerns the right to vote. It is settled that the right to vote is not one of the privileges or immunities of citizens of the United States within the meaning of article 14 of the amendments of the Constitution of the United States."

The appropriation of private property for the public benefit and use without previous payment therefor, or payment into court for the benefit of the owner, has been challenged in the courts in the various forms in which recent legislation has presented it.

The Boulevard cases, where both parties are of the community beneficially interested, differs from the Watershed cases, wherein not only private rights but community interests are invaded for the use of a separate district and a distant part of the State. In *Missouri* and *Pennsylvania*² the courts have upheld the owner's rights where an owner has been prohibited from building on a front strip of his lot. Respecting property in Chestnut street, in Philadelphia, where a pet-

¹ Mass. Stat. 1893, chap. 351.

² *U. S. v. Cruikshank*, 92 U. S. 542; *U. S. v. Reese*, id. 314; *Ex parte Yarbrough*, 110 U. S. 651; *Minor v. Happersett*, 21 Wall. 178.

³ *City v. Linnard*, 97 Pa. St. 242; *Re Chestnut St.*, 118 Pa. St. 508; 12 Atl. R. 551.

mit was given upon a new line set back from that of the old building, and the owner conformed to the law, she was met in a suit for compensation with the plea that having voluntarily torn down her front wall, and rebuilt according to the new line, the injury which she complained of was due to her own action, and therefore she could not recover. The court however said: "By forced law the instant the old building was torn down the city took part of the land for public use, and is liable to make compensation to the owner, the same as if it had been taken in any other way."

In *City of St. Louis v. Hill*¹ the Supreme Court of Missouri held the Boulevard Law to be unconstitutional, and further, that "where a statute providing that where a city changed a line or grade without consent of the abutting owners, or where the compensation could not be agreed upon, and proceedings had not been instituted to condemn the land before the commencement of the work, the owners should be entitled to an action against the city to recover the damage caused by the improvement, was also unconstitutional, in that it allows property of the citizen to be taken before the compensation is paid to the owner, or into court for the owner." The court said: "The day before the ordinance went into operation defendant had the unquestionable right to build at will on his lot. The day afterward he was as effectually prevented from building on the forty-feet strip, except under peril of punishment, as if the city had built a wall around it, and this too without any form of notice, any species of judicial inquiry, or any tender of compensation. If this is not a taking by mere arbitrary edict, it is difficult to express in words the meaning which should characterize the act of the city. The premises considered, we hold that the Boulevard Law is unconstitutional, because it violates section 30, article 2 of the Constitution, in that it makes no provision for any proceeding in a court of law for condemning property, nor for notice to the owner, and therefore deprives any citizen interested along the given route of his property without due process of law. Nor does the ordinance in question make any such provision. The Boulevard Law is unconstitutional in that it makes no provision for compensation for those whose prop-

¹ Supreme Court of Missouri, June, 1893, 23 S. W. R. 861; *Lowrey v. Rainwater*, 70 Mo. 152; *Rendering Co. v. Behr*, 77 Mo. 91, and cases cited; *Elliott Roads & S.* 150; *City of Grand Rapids v. Powers*, 98 Mich. 103, 104, and cases cited; 50 N. W. R. 661; *City of Janesville v. Carpenter*, 77 Wis. 238; 46 N. W. R. 128; *Walther v. Warner*, 25 Mo. 277; *Provolt v. Railroad Co.*, 57 Mo. 261; *Evans v. Railroad Co.*, 64 Mo. 453.

erty is taken; nor is any such provision made in the ordinance by virtue of which defendant was arrested. Section 21, article 2 of our Constitution declares that private property shall not be taken or damaged for public use without just compensation."

The Court of Claims found in favor of owners of wells for damages "in the construction of a tunnel to increase the water supply of the city of Washington, under the act of Congress of July 15, 1882, whereby the wells were drained and destroyed, although in one instance a well was located on land not embraced in the map and survey of land to be taken under the act, and in fact was five hundred feet distant from the tunnel, which was one hundred and fifty feet below the surface of the neighboring ground. The Supreme Court of the United States has now affirmed these judgments, basing its opinion however upon the words of the statute construed to be remedial.¹ The court declares that any person who shall not have been tendered payment shall have declined to accept the amount tendered for lands taken "and any person who by reason of the taking of said land, or by the construction of the works hereinafter directed to be constructed, shall be directly injured in any property right, may file a petition," etc. The court says: "The cases which hold that remote and consequential injury to private property, by reason of authorized public improvements, is not taking such property for public use, have many of them gone to the utmost limits of that principle, and some beyond it, though the principle is a sound one in its proper application to many injuries originating. The opinion proceeds to say that the finding of the court below is, that the wells were drained and destroyed by the tunnel, and that 'we regard such finding as proof that the owners of the property suffered a direct injury within the meaning of the remedial provisions of the statute, and that these are within the suggestion of Chief Justice Gibson in the noted case of *O'Connor v. Pittsburgh*, 18 Pa. St. 187, 190." "The constitutional provision for the case of property taken for public use extends not to the case of property injured or destroyed; but it follows not that the omission may not be supplied by ordinary legislation." The argument also considered "that the owner of land may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if in the exercise of such right he intercepts or drains off the water collected from underground springs

¹ *U. S. v. Alexander*; *id. v. Truesdell*, 149 U. S. 186, 196; see *Elster v. Springfield*, 49 Ohio, 82.

in his neighbor's well, this inconvenience falls within the description of *damnum absque injuria*, which cannot become the ground of an action. The opinion says: "We recognize this as sound doctrine in the ordinary case of a question between adjoining owners of land. But in a case like the present, where the injury complained of is inflicted by the construction of a public work, over land upon which the public authority has acquired a right of way only, and where the statute provides remedies for such injury, the law has been held to be otherwise in cases whose reasoning demands our assent."

This question however of the respective rights of adjoining proprietors in the use made of another's land is strangely but very strongly presented in the recent case of *Hague v. Wheeler*,¹ where an injunction was sought and refused by the Pennsylvania courts against the asserted rights to waste and "destroy one's own property," and the court held the maxim "*sic utere tuo ut alienum non laedas*" did not apply. The case is said to have no precedent, because as was well said elsewhere, no nuisance was created, and it was not possible to show that the necessities of society require courts to say, "that private property of such kind and susceptible of such monopolization was affected with a public interest, and in the long run under the laws of nature and actual experiences of commerce, it is much more important for the

¹ *Hague v. Wheeler*, 27 Atl. R. 714; see *Brown v. Equitable Gas Co.*, 155 Pa. St. 359; N. Y. L. J., Nov. 24, 1893. Editorial reproducing abstract of *Hague v. Wheeler* under the title, "The right to destroy one's own," says: "The question is suggested — on what theory, if at all, could the legislature prohibit the wanton destruction by a private owner of a spontaneous product or fruit of his land? If natural gas be suffered to escape in such manner as to constitute a nuisance, public or private, there would be a remedy in the courts without legislative aid. The legislature might, in the exercise of the police power, make any proper regulations for public safety or health in the use of natural gas. But eliminating these elements, and considering simply the question of wanton waste, it would seem that an American legislature would be as powerless to interfere as the courts themselves. In England owing to the absence of a written Constitution, the same difficulty would not exist. The British legislation creating the Irish Land Courts involved a paternal interference with private ownership of property, in the interest of the general public, which would be repugnant to American constitutional law. If it were physically possible that all the natural gas in Pennsylvania could be drawn to one well, or a number of wells owned by an individual, and allowed by him to escape and waste, either because he believed its use injurious to mankind or out of sheer wantonness; if all the anthracite coal lands in the State had been acquired by a syndicate, that for their own purposes, absolutely refused to allow them to be mined for an indefinite period, the necessities of society might, indeed, require the courts to say that private property of such kind and susceptible of such monopolization was affected with a public interest. But such conditions of affairs are not to be apprehended."

public good, that the inviolability of private property be guaranteed against socialistic invasion, than that occasional and exceptional instances of private ownership be suppressed."

The statement in the opinion of the Supreme Court of Pennsylvania is as follows: "Three land-owners owning considerable holdings in the same basin, or overlying the same gas-bearing sand rock, each having an open gas well or wells on his land, drilled without malice or negligence in a lawful manner, and for a lawful purpose. Two of these owners have been able to utilize the gas from their respective lands and find a market for it. One of them has not been so fortunate. He has gas flowing from his well, but up to the time of the filing of this bill he has not been able to utilize or dispose of it, and his gas has gone to waste for that reason. His more fortunate neighbors come into a court of equity, and ask that he shall not be permitted to let his gas run, because while this gas is in his own, underlying his tract, and finding its way to the surface through his well, it has a tendency to drain the sand rock, and so to reduce ultimately the flow of gas from their wells. This would be equally true if the defendants were able to utilize their gas; yet it is conceded that in that case their right to the gas from their well would be as incontestable as the right of the plaintiffs to the use of the gas from theirs. How is that right lost? By their inability to find a purchaser? If they can find a purchaser, or turn the gas to any useful purpose, their right to the gas that flows from their well is conceded. If they cannot, their right is denied. Their well must be shut in while their successful neighbors drain the entire basin through their open wells, and receive pay for the gas. This is a proposition to limit the power of the owner over his own by the use he is able to make of it. * * * We cannot find any rule of law or any principle of equity on which such an injunction can rest. The scope of the golden rule may be sufficiently ample to cover this case, and it may be that it would require an owner to surrender to his neighbor so much of his own property as he could not turn to his own advantage, if his neighbor was so situated that he could profit by it.

"Assuming this to be so, the moral obligation so arising is not enforceable by civil process. The owner of lumber may pile it in heaps and burn it, as was done in the early settlement of the country, notwithstanding the fact that his neighbor has a saw-mill and all the facilities for preparing the sawed lumber for market and converting it into money. The power of the owner of the timber over it is neither greater nor less because of his neighbor's readiness and ability to market it. An owner of

land may have a deposit of coal under some portion of it so small in extent, or with such an inclination as to make it impossible for him to mine through his own tract without a greater cost to him than the value of the mined coal when brought to the surface. His neighbor may have an open mine that reaches it, and through which it could be brought at a fair profit. These circumstances do not affect the title of the owner of the coal, or confer any right on the adjoining mine-owner; but it is said that the oil and gas are unlike the solid minerals, since they may move through the interstitial spaces or crevices in the sand rocks in search of an opening through which they may escape from the pressure to which they are subject. This is probably true. It is one of the contingencies to which this species of property is subject. But the owner of the surface is an owner downward to the center, until the underlying strata have been severed from the surface by sale. What is found within the boundaries of his tract belongs to him according to its nature. The air and the water he may use. The coal and iron or other solid mineral he may mine and carry away. The oil and gas he may bring to the surface and sell in like manner, to be carried away and consumed.

“His dominion is, upon general principles, as absolute over the fluid as the solid minerals. It is exercised in the same manner, and with the same results. He cannot estimate the quantity in place of gas or oil, as he might of the solid minerals. He cannot prevent its movement away from him toward an outlet on some other person's land, which may be more or less rapid, depending on the dip of the rock or the coarseness of the sand composing it; but so long as he can reach it and bring it to the surface, it is his absolutely, to sell, to use, to give away, or to squander, as in the case of his other property. In the disposition he may make of it, he is subject to two limitations — he must not disregard his obligations to the public; he must not disregard his neighbor's rights. If he uses his product in such a manner as to violate any rule of public policy, or any positive provision of the written law, he brings himself within the reach of the courts. If the use he makes of his own, or its waste, is injurious to the property or the health of others, such use or waste may be restrained, or damages recovered therefor; but, subject to these limitations, his power as an owner is absolute, until the legislature shall, in the interest of the public as consumers, restrict and regulate it by statute.”

In the light of these decisions, and of the authorities discussed in a previous chapter on the protection of purity in water, we may take up

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the study of the recent "Watershed" Law of New York State,¹ with particular reference to two inquiries pertinent to our general subject. First, as the methods of this law, and how far they are consistent with or vary from, those of other acts of like character which have borne successfully the ordeal of review in the higher courts. Second, whether this is strictly of police legislation as generally recognized, or is rather to be classed among other titles, and conditioned upon the sovereignty of the State, rather than the necessity for the protection of the public welfare.

The inquiry is not merely of theoretical or scientific concern. The object proposed in the title of the act is for the utility of the metropolis and of interest more or less to perhaps one-third of the population of the State. There are no insuperable legal obstacles in the way of its accomplishment in accordance with established precedents, and even the details of interference, prescribed in the twenty-seventh section² in "such instances as may be necessary to preserve from pollution and

¹ See chap. VII, *ante*; N. Y. Laws 1898, chap. 189. "An act to provide for the sanitary protection of the sources of water supply of the city of New York."

² Chap. 189 of the Laws of 1898. "§ 27. The commissioner of public works of the city of New York is hereby authorized to take such measures as may be necessary to preserve from pollution and defilement all the sources of the water supply, whether the same be rivers or other water-courses, lakes, ponds or reservoirs situate in the counties of Westchester, Dutchess and Putnam, and to that end to enter in and upon at any time within three years after the passage of this act any or all lands near, on, adjacent or contiguous to any of the said sources of water supply and to abate and remove the cause of any such pollution or defilement. And all damages and injuries to property occasioned by any act under this section shall be ascertained, determined and paid for in accordance with the provisions of the preceding sections of this act. And the said commissioner of public works shall within ten days after taking such measures, or making such rules and regulations or the enforcement thereof, institute proceedings under the provisions of this act to ascertain and determine all damages and injuries to property occasioned thereby. And if such proceedings are not so instituted any person injuriously affected in property shall have a cause of action therefor against the mayor, aldermen, and commonalty of the city of New York, and may bring an action against them for all damages and injuries sustained, which action shall be tried in the county where the premises or property affected is situated. And all sums awarded by the commissioners of appraisal for damages or injuries sustained under any act or doing under the provisions of this section shall be paid by the city of New York as provided by section seventeen of this act, and in case the same is not so paid the person or persons to whom any sum is awarded may bring suit therefor, as provided in section seventeen of this act, and in which action the plaintiff shall be absolutely entitled to have judgment rendered in his favor, on filing a certified copy of the report of the commissioners of appraisal, and of the order confirming the same, and on which, action shall be tried in the county where the premises or property affected is situated."

defilement all the sources of water supply, whether the same be rivers or other water-courses, lakes, ponds or reservoirs situate in the counties of Westchester, Dutchess and Putnam," might naturally fall within police powers, and the administration be intrusted in a metropolitan district, to an officer of extended territorial jurisdiction.

The use of water from these sources had been accorded to the city of New York by previous legislation for the purpose of drinking water, and the system for it has been in force for many years.

To carry refuse into a great public river and thereby render the waters corrupt, insalubrious and unfit for the use of man, has long been held an indictable offense both in the principals, the managers of a corporation, and their servants and agents. In the Bishop of Auckland case, it was held not necessary to limit the definition of nuisance to an actual injury to the inhabitants of the district.¹ The Penal Code and the duties enjoined upon the State Board of Health in the State of New York have this basis. The time-honored rule of the country that natural streams are natural sewers, has been practically overcome in most localities and the principle is now established, that every riparian proprietor, and by the same right every one entitled to a use of the water, can insist that the stream shall flow to him in its accustomed quantity, quality, place and level, free from pollution.²

¹ *Rex v. Medley Co.*, 6 C. & P. 292; see chap. VII, notes, pp. 140-2; *Bishop Auckland case*, 48 L. T. R. (N. S.) 223; *Atty.-Gen. v. Cockermouth L. B.*, L. R., 18 Eq. 172; N. Y. P. C., § 890; N. Y. L. 1885, chap. 548; see, also, chap. 235, 1892.

² *Indianapolis Water Co. v. American Straw Bd. Co.*, 53 Fed. R. 970; *Case of Hoffman*, 54 N. W. R. 798; *Clowes v. Staffordshire Potteries Water-Works Company*, 8 Chan. App. Cases L. R. 125; *Gould Waters*, § 223; *Lyon v. McLaughlin*, 32 Vt. 423; *Holsman v. Spring Bleaching Co.*, 14 N. J. Eq. 835; *High Inj.* (3d ed.) §§ 749, 795. The very clear and forcible opinion of Mr. Justice Baker in the *Indianapolis Water Company case* is reprinted in 47 Alb. L. J. 359. In *Columbus & H. C. I. Co. v. Tucker*, 48 Ohio St. 42, an action to recover damages for pollution of a stream by deposits of coal slack dirt and refuse, the mode of mining in the district was held no defense, nor that the only feasible places of deposit were used by the defendant, who was also held responsible for the acts of its employees in putting slack and refuse in the stream. *Simon Schriver v. Village of Johnston*, 54 N. Y. St. R. 578; *Bierer v. Hurst*, 155 Pa. St. 523. In *Kellogg v. City of New Britain*, 62 Conn. 232, damages were had for the pollution of Piper Brook, which stream ran through the town, and by virtue of Conn. Stat. 1872, § 36 had been turned into a sewer, but the waters were rendered noxious and offensive as they reached plaintiff's land below the city and there was no intention to allow the city to take the stream until it had paid all the damages it might thereby do to any individual." *State v. Frieberg*, 49 Ohio St. 585, was an indictment for putting filth and offensive substances into a fork of the little Miami river.

To declare nuisances, order their removal, and remove the pollution of streams which are sources of potable water supply is of ordinary and well-established law. Courts of law and equity, and even on the criminal side, when indictments have been found, have used the necessary powers. There is no vendible personal, or real right, to maintain a dangerous nuisance on such a stream. Undoubtedly the legislature may provide payment for ordinary property destroyed for the benefit of the community,¹ but the law before us does not rest there. Eminent domain is its scope, and discretionary powers heretofore unknown without apparent responsibility for their use, unless a crime be the consequence, are reposed in a single officer, and citizens' rights to a judgment, after being heard upon the principal issue of any controversy, and of appeal, are either abridged so greatly as to require much search for their trace, or are abased entirely, save in one particular under the twenty-seventh section of the act,—where the owner has a limited appeal from the amount of the award.² This then appears a tremendous advance in legislative and official power, which so far has not yet been acquired in England, or in many of our States, notably those whose decisions were discussed in *City of St. Louis v. Hill*,³ cited above.

Eminent domain as generally regulated includes a provision similar to that of the railroad law⁴ of New York. "Any occupant or owner aggrieved by the proposed location" may give notice of an application to the Supreme Court in the judicial district where the lands are situated "for the appointment of commissioners to examine the route," etc., etc.

This matter is in this case to be decided as follows by the first section of the act: "It shall be lawful for the commissioner of public works of the city of New York, acting for and on behalf of the mayor, aldermen and commonalty of said city of New York, to acquire or take, in the manner hereinafter set forth, title to all or any of the real estate, and acquire or extinguish any interest therein of which the

¹ *Ely v. Supervisors*, 36 N. Y. 297; *Re Chestnut St.*, 118 Pa. St. 593.

² As to an appraisal the principal question having been judicially determined, viz.: That the property is to be condemned, the rule is a severe one upholding the award of courts even if as in one case there was evidence that it was \$21,000 to \$26,000 below the actual value of land taken; see opinion of Mr. Justice Brady, 27 Hun, 412, in *Matter of Boston Road*, and *Matter of Com'rs of Central Park*, 51 Barb. 277.

³ *St. Louis v. Hill*, 22 S. W. R. 861.

⁴ N. Y. L. 1892, p. 2051, chap. 676; 1892, § 6, p. 2055; *Matter of City of Buffalo*, 54 N. Y. St. R. 692; 189 N. Y. 422.

acquisition, taking or extinguishment may be necessary, for the sanitary protection of all rivers and other water-courses, lakes, ponds and rivers, in the counties of Westchester, Putnam and Dutchess, so far as the same now are, or hereafter may be, used for the supply of water for the city of New York."

The notices in the present law to be given are by the counsel to the corporation of the city of New York of an application for the appointment of commissioners of appraisal, and the court, by section 9 of the act,¹ "upon due proof to its satisfaction of the publication and posting" of the notice upon filing the petition, "shall make and order the appointment of three disinterested and competent freeholders," etc. These commissioners shall take and file the oath of office, and thereupon, by section 11, "*On filing said oath in the manner provided by the last section, the said mayor, aldermen and commonalty shall become seized in fee of all those parcels of real estate which are on the maps in the fifth section referred to, and described on said map or maps and statement, as parcels which it had been determined by said commissioner of public works of the city of New York that the fee should be acquired, and may immediately or at any time or times thereafter, take possession of the same or of any part or parts thereof, without any suit or proceedings at law for that purpose, and said commissioner of public works and said mayor, aldermen and commonalty of the city of New York, or any person acting under his or its authority, may enter upon, use and occupy in perpetuity, all the parcels of real estate described in said maps, for the purpose of carrying out the provisions of this act. And upon the filing of the said oath, all the interests, as the same are defined in section 2 hereof, in the real estate on said map set forth, and in said statement more particularly described, which are on said map or maps, and in said statement described as parcels in relation to which some interest is to be taken, acquired or extinguished, shall be taken, acquired or extinguished as on said map and in said statement set forth, and shall thereupon be acquired by, vest in, or be extinguished by, as the case may be, the mayor, aldermen and commonalty of the city of New York, without any suit or proceeding at law for that purpose, and the said mayor, aldermen and commonalty of the city of New York, or any person or persons acting under its authority, or under that of the said commissioner of public works, may enter upon all the said parcels of real estate for the purpose of taking,*

¹ *Monongahela Nav. Co. v. U. S.*, 148 U. S. 327; N. Y. L., chap. 189, 1893, §§ 8, 9, 10, 11, 17, 19, 22, 27.

acquiring or extinguishing the said interest in said real estate. And when any highway is destroyed, or any change in location thereof occasioned by any proceedings under this act, the same shall be restored and changed by the city of New York, and if there is any increase in the length of said highway or if any railings are necessary to be constructed, the city of New York shall construct the same and shall perpetually maintain such increase and all railings necessary to be constructed, or shall pay to the proper public officials a gross sum of money sufficient to enable the town where the highways are located or changed to so maintain the same." This appraisal is made by the nineteenth section,¹ exclusive of any claims not presented in one year after the appointment of commissioners.

The only appeal is from the appraisal by the twenty-second section as follows :

" Within twenty days after the notice of the confirmation of the report of the commissioners, as provided in the sixteenth section of this act, which notice may, as to parties who have not appeared before the commissioners, be given in the manner provided in the fifteenth section of this act, either party may, by appeal or notice in writing to the other party, appeal to the Supreme Court from the appraisal and report of the commissioners. Such appeal shall be heard on due notice

¹ " § 19. Every owner or person in any way interested in any real estate taken or entered upon or used and occupied for the purposes contemplated by this act, and any owner or person interested in any real estate contiguous or adjacent thereto, or having as to or in such real estate any estate, right, title, interest, privilege or easement which may be in any way affected by the acquisition or taking of said real estate, or the acquisition, taking or extinguishment of any interest therein, whether such adjacent or contiguous real estate is shown on the plan or plans, map or maps, or not, if he intends to make claim for compensation for such acquisition, taking or extinguishment, shall within one year after the appointment of the commissioners of appraisal, exhibit to the said commissioners a statement of his claim, and shall thereupon be entitled to offer testimony and to be heard before them touching such claim and the compensation proper to be made to him, and to have a determination made by such commissioners of appraisal, as to the amount of such compensation. Every person neglecting or refusing to present such claim within said times shall be deemed to have surrendered his rights, title, privilege, interest or easement in and to such real estate, or the claim for damages to any such real estate, right, title, interest, privilege or easement, except so far as he may be entitled as such owner or person interested to the whole or any part of the same, or money awarded by the commissioners of appraisal as a just and equitable compensation for taking, using and occupying, or as damages for the acquisition, taking or extinguishment of any estate, right, title, interest, privilege or easement affecting the real estate owned by said person or in which said person is interested."

thereof being given, according to the rules and practice of said court, either at a Special or General Term thereof, as the appellant may desire. On the hearing of such appeal the court may direct a new appraisal and determination of any question passed upon by the same or new commissioners in its discretion, but from any determination of the Special Term an appeal may be taken to the General Term, and from any determination of the General Term either party, if aggrieved, may take an appeal which shall be heard and determined by the Court of Appeals. In the case of a new appraisal the second report shall be final and conclusive on all parties and persons interested. If the amount of compensation to be made by said city is increased by the second report, the difference shall be paid by the comptroller of the city of New York to the parties entitled to the same, or shall be deposited as the court may direct, and if the amount is diminished, the difference shall be refunded to the said mayor, aldermen and commonalty of the city of New York by the party to whom the same may have been paid, and judgment therefor may be rendered by the court on the filing of the second report against the parties liable to pay the same, but the taking of an appeal by any person or persons shall not operate to stay the proceedings under this act, except as to the particular parcel of real estate to which said appeal relates. Such appeal shall be heard upon the evidence taken before said commissioners and any affidavit as to irregularities, and three printed copies of such evidence shall be furnished by the mayor, aldermen and commonalty of the city of New York to the party taking the appeal, within ten days after the appeal is perfected, and such appeal may be heard on the evidence so furnished and such appeals may be taken without security thereon."

The location is fixed by the maps¹ filed by the commissioner of public works, and he shall determine how testimony is to be taken, and shall afford hearings to persons interested in the acquisition, but no proceedings of this kind are set forth by the twenty-seventh section. What are the necessary measures to preserve the waters from pollution and defilement seem to be remitted to the commissioner, but damages and injuries to property thereby are to be appraised as for acquisition of property. This involves the payment for nuisances, determined to be such by the officer who adjudges their character, and institutes pro-

¹ N. Y. 1893, chap. 189, § 3; *Kelley v. Daly*, Sp. Term, Putnam Co., Jan., 1894; see *infra*; 189 N. Y. 432; 140 N. Y. 1.

ceedings to ascertain and determine all damages and injuries to property by the enforcement of the rules and regulations he is directed to make.

Payment of the awards is to be made, by the seventeenth section,¹ within four calendar months after the confirmation of the report of the commissioners of appraisal, with interest from the date of filing the oath of the commissioners. Title had already vested by the terms of the act at the earlier period at which interest begins. The alternative is presented in case of non-payment, that the persons in whose favor awards are made may sue for and recover their amounts, with interest and the costs of suit, as in the case of the Missouri law passed upon in *City of St. Louis v. Hill*.

The financial burden is laid upon the city of New York to provide not more than \$500,000 in any one year to pay for "any real estate, or for the acquisition, taking and extinguishment of any right, title, interest, privilege or easement therein, and all damages appraised to persons interested therein, together with all expenses necessarily incurred."

¹ § 17. "The said city of New York shall, within four calendar months after the confirmation of the report of the commissioners of appraisal, pay to the respective owners or persons interested and bodies politic or corporate, mentioned or referred to in said report, in whose favor any sum or sums of money shall be estimated and reported by said commissioners, the respective sum or sums so estimated and reported in their favor, respectively, with lawful interest thereon from the date of filing the oath and certified copies thereof, as by the tenth section of this act required. And in case of neglect or default of the payment of the same within the time aforesaid, the respective person or persons, or bodies politic or corporate, in whose favor the same shall be so reported, his, her or their executors, administrators or successors, at any time or times after application first made by him, her or them to the comptroller of the city of New York for payment thereof, may sue for and recover the same with lawful interest as aforesaid, and the costs of suit in any proper form of action against the said mayor, aldermen and commonalty of the city of New York, in any court having cognizance thereof, and which action may be brought in the county where the real estate affected is situated, and in which it shall be sufficient to declare generally for so much money due to the plaintiff or plaintiffs therein by virtue of this act for real estate taken or affected, or for any estate, right, title, interest, term, easement or privilege pertaining thereto, taken, acquired, affected or extinguished for the purposes herein mentioned, and the introduction in evidence of a certified copy of the report of said commissioners, and of the said order of confirmation, with proof of the right and title of the plaintiff or plaintiffs to the sum or sums demanded, shall be conclusive evidence in such suit or action and entitle the plaintiff absolutely to judgment thereon."

² N. Y. L., chap. 189, 1898, §§ 29, 30.

"The mode of exercising the right of eminent domain in the absence of any provisions of organic law prescribing a contrary course is within the discretion of the legislature. There is no limitation upon the power of the legislature in this respect, if the purpose be a public one and just compensation be paid or tendered to the owner for the property taken, and the remark is made by the Supreme Court in this case of *Secombe v. Railroad*¹ that prior occupation without authority of law, although a trespass, does not preclude subsequent measures authorized by law to condemn the land.

It has been said that payment need not precede seizure, but that the means for securing indemnity must be such that the owner will be put to no risk or unreasonable delay. By instigating a suit for compensation the owner assents to the taking of his property for public use and has agreed to submit the determination of the question of compensation to the tribunal named.² The opinion is quoted with approval by the Supreme Court of the United States in *Searl v. School District* that it is the duty of the State in the conduct of the inquest to see that it is just, not merely to the individual whose property is taken, but to the public, which is to pay for it. "Property cannot be taken under eminent domain without first making or securing payment of damages." Seifert's³ case goes further and says, where the exercise of judicial or discretionary power by a municipal corporation results in a direct and physical injury to the property of an individual which from its nature is continuous, but is remedial by a change of plan and the adoption of prudential measures, the corporation is liable for such damages as occur.

¹ *Secombe v. R. R. Co.*, 22 Wall. 108; *Kellogg v. City of New Britain*, 62 Conn. 282; *Boston v. Brookline*, 156 Mass. 172.

² *Haverhill Bridge Co. v. Essex*, 108 Mass. 120, 124; *Great Falls Mfg. Co. v. Garland*, 124 U. S. 501. "The question of compensation is judicial." *Matter of the City of Buffalo*, 54 N. Y. State R. 692; 189 N. Y. 422; see *Monongahela Nav. Co. v. U. S.*, 148 U. S. 827; *Cavanagh v. Durgin*, 156 Mass. 146.

³ *Searl v. School District*, 133 U. S. 533, and see note L. ed. p. 741; *Garrison v. New York*, 21 Wall. 196; *Kellogg v. City of New Britain*, 62 Conn. 282.

⁴ *Sterling's App. (Pa.)*, 3 Cent. R. 51; *Seifert v. Brooklyn*, 101 N. Y. 186; *Smith v. Inge*, 80 Ala. 288; *Petition of Mayor of N. Y.*, 99 N. Y. 569; *Bethlehem, South, Gas & W. Co. v. Yoder (Pa.)*, 2 Cent. R. 599; 112 Pa. St. 186; *Cavanagh v. Durgin*, 156 Mass. 466; *Morton v. Mayor, etc.*, 140 N. Y. 207; *People v. Board of Health*, 140 N. Y. 1. "Public officers or private persons who in abating a nuisance destroy or injure private property act at their peril and will be held liable unless the thing abated is a nuisance." *City of St. Louis v. Hill*, 22 S. W. R. 861; see note 1, p. 451, *supra*.

The objections to this law have been made that to give the property owner a lawsuit for the value of his property is no compensation, and if the question of amount is to be the subject of controversy, then so long as the controversy exists the land-owner cannot be held to have ceased to be the owner of the subject-matter, over which he is forced to litigate in defense of his title if he chooses, or else upon the question of just compensation. Again difficulties of a more practical nature have been urged that buildings having been destroyed before the hearings on the question of compensation, the property-owner's best evidence as to value will have been removed; secondly, mortgages falling due on property within the region upon which the bill is intended to operate cannot be renewed, loans cannot be obtained, and the property-owner will have no protection against foreclosure; thirdly, leasing of property will be interfered with; fourthly, delays in condemnation proceedings will be increased under the bill, for the city, having obtained both the possession and the title of the property, will have no motive to hasten the day of payment; fifthly, the bill reverses the usual order of due process of law by making the possession and title to property precede payment.

These objections to the effect of the law upon property rights are, of course, no answer to the claim of authority on the part of the legislature, if the constitutional guaranties of personal rights have not been invaded. It may even be, as said by Mr. Justice Andrews in *People v. Budd*, that "the police power may be used for illegitimate ends, although no court can say a fundamental law has been violated." But it must be remembered that a statute must stand so long as a reasonable doubt can be indulged in favor of its constitutionality." As the same learned judge also says: "No serious invasion of constitutional guaranties can for a long time withstand the searching influence of public opinion, which sooner or later is sure to come to the side of law and order and justice." Two principal questions will for the present remain for the consideration of the land-owner in the territory affected: 1. Whether his title can be immediately wrested from him, and vested in another, upon the commencement of proceedings by the commissioner of public works of the city of New York to condemn the property. 2. Whether the determination of the commissioner to condemn the lands described in his maps, and of the fact of the existence of a nuisance thereon, and to the effect described by him, is final, and the ordinary avenues to the courts for the settlement of issues are closed.

To the tax payer, also, two questions will be of interest:

1. The binding force of this principle, that nuisances and their locality in adjoining counties are to be purchased at his cost and for his benefit, when the commissioner of public works decides upon this course.

2. Whether the object of the law, as expressed in the title, is to be attained by these methods, and the use of these waters already belonging to New York, the city is to prevent defilement and pollution by merely purchasing nuisances in existence.

In *Sweet v. City of Syracuse*, the constitutionality of an act of the legislature of New York was sustained, authorizing the city of Syracuse to take water from Skaneateles lake, seventeen miles distant, but the contention was on the part of a tax payer of the city of Syracuse against the burden of expenses; and the court holds that "there is no doubt that the State has a certain property right in Skaneateles lake and its outlets. Lands appropriated by the canal authorities for the use of a canal, under the statute, are held by the State in fee." In *Smith v. City of Rochester* another question arose. "This action was brought by plaintiffs as owners and lessees of mills and manufactories situated upon the banks of Honeoye creek, to restrain defendants from diverting the waters of Hemlock lake from said creek." Hemlock lake is a body of water in Livingston county, N. Y., about seven miles long and one-half mile wide, and its outlet, uniting with the outlet of Canadice lake, forms the creek. The legislature, in 1873, passed an act authorizing the water commissioners of Rochester to enter upon, control and use, as agents of the city of Rochester, the waters of these lakes, for the purpose of procuring a water supply for the city of Rochester; that they should have power to raise the surface of the water two feet, or draw it down below low-water mark eight feet, and they also had the right to protect the same from improper obstruction, or pollution from any cause, and it was declared that the city of Rochester should be liable to pay to the owners of property adjacent to, or dependent upon the lakes, the damages caused by the exercise of these powers. The judgment of the lower court that the State was the owner of Hemlock lake and its waters, and that by virtue of a grant from the State the defendant had full power and authority to divert

¹ *Sweet v. City of Syracuse*, 129 N. Y. 816, 884; *Heacock v. State*, 105 N. Y. 248; *Marsh v. State*, 97 id. 572; *Smith v. Rochester*, 92 N. Y. 463; see *U. S. v. Alexander*, 149 U. S. 186; *Hague v. Wheeler*, 27 Atl. R. 714; *Morton v. Mayor*, 140 N. Y. 207; *People, ex rel. Copcutt, v. Board of Health*, 140 N. Y. 1.

the waters as fully as it had done, and dismissing the complaint, was reversed. The Court of Appeals held "the riparian owners of lands adjoining fresh water, non-navigable streams, take title to the thread of the stream, and as incident to the title acquire the right to the usufructuary enjoyment of the undiminished and undisturbed flow of said stream. This is so also as to the fresh water navigable streams and small lakes within this State, where the tide does not ebb and flow, save that the public has an easement in such waters for the purpose of travel, as on a public highway, which easement, as it pertains to the sovereignty of the State, is inalienable, and gives to the State the right to use, regulate and control the waters for the purposes of navigation. This public easement gives the State no right to convert the waters, or to authorize their conversion, to any other uses than those for which the easement was created; *i. e.*, for the purposes of navigation. The right to divert the waters for other uses, although public in their nature, can only be acquired under and by virtue of the sovereign right of eminent domain, and upon making "just compensation," and the court said in relation to the judgment below: "It is enough that the plaintiffs have a clear legal right which has been invaded, and the right to try the question of the extent of their injury has been denied them. It is possible that, upon all the circumstances of the case, the court below may, in the exercise of their discretion, deny a remedy by injunction, or grant it upon terms and conditions such as in their judgment will best preserve the rights and interests of the parties. But the plaintiffs have an undoubted right to the exercise of such discretion by the court. This has been refused them, and for that reason a new trial must be ordered."

It is not improbable that this case and the decisions following it were the origin in the State of New York¹ of the application of the theory of eminent domain to the protection against defilement of potable waters. In *Silsby Manufacturing Company v. The State of New York*, the State having acquired the right to use the waters of Seneca river necessary for the purposes of navigation on its canal, it was held that a claim was made out for the diversion of more water than was necessary, and that the State was not the sole judge of the necessity and of the amount to be taken. In *McKee v. The President, Managers and Company of the Delaware and Hudson Canal Com-*

¹ *Silsby M. Co. v. N. Y.*, 104 N. Y. 562; see however opinion in *Matter of Ryers*, 72 N. Y. 1, a drainage case.

² *McKee v. President, D. & H. C. Co.*, 125 N. Y. 352.

pany, one riparian owner was held liable to a lower owner, for damages as for a trespass, from his manner of use of the waters of a natural stream, and the defendants never having acquired the right to use the stream by condemnation proceedings or otherwise, it was held that the plaintiff was entitled to the relief sought, and that the special provision for assessing damages in such cases, contained in defendant's charter, did not deprive plaintiff of his remedy at law or in equity.

This would seem the usual and almost necessary course, that the facts upon which all the proceedings authorized by the law depend should be found between both parties, by an impartial tribunal, and not by one of the parties alone.

Such an appeal was made to the New York Supreme Court in December, 1893, in the case of *Roxanna Kelley v. The Mayor, etc., and Michael T. Daly*,¹ as Commissioner of Public Works of the city of New York. The decision of Mr. Justice Dykman is the first adjudication under this law. The syllabus states among others the following propositions maintained, that: "By the settled law of this State it is within the competence of the legislature to authorize municipal corporations to take private property for public use without first making payment, provided a certain and adequate provision is made, by which the owner can coerce compensation, through the judicial tribunals or otherwise, without unreasonable delay.

"The Watershed Act, chapter 189 of the Laws of 1893, is a valid exercise of legislative power, and is not violative of the Constitution of the State, or of the United States.

"No person can obtain a prescriptive right to maintain a public nuisance; and it seems that the same rule applies to a *mixed nuisance*, as that is, in one sense, public.

"The police power of the State, which authorizes the legislature to pass laws for the protection of the health and safety of the public, and which is a power sufficient to warrant the destruction of property for the protection of the public health without compensation, is, in this particular, founded upon the rule of law which requires one person so to use his property as not to interfere with the rights of his neighbors.

"The abatement of a public nuisance detrimental to public health is one of the ordinary functions of the public power of the State, and

¹ N. Y. Sup. Ct., Special Term, Putnam county, Jan., 1894, *Roxanna Kelley v. The Mayor, Aldermen, and Michael T. Daly*, as Commissioner of Public Works of the City of New York, published in N. Y. L. J., Jan. 31, 1894.

such power may be exercised in a manner adequate to afford an effectual remedy.

The opinion finds the facts as follows:

"The water supply of the city of New York is derived entirely from the valley of the Croton river. The watershed embraces an area of about three hundred square miles in extent, and is drained by the three branches of the Croton, designated as the eastern, middle and western. These branches unite in the upper part of Westchester county, and the river runs on for several miles, until it receives the Muscoot river, which brings the water from Lake Mahopac, and then it flows into Croton lake.

"When it had been determined that the valley of the Croton should be utilized for the procurement of water for the municipality, the legislature passed a law authorizing the city to acquire title to land, by right of eminent domain, for the construction of a dam and reservoir at the southerly end of the shed, for the impounding of the water, and an aqueduct to convey the water to the city. Under that legislative authority, the dam, aqueduct and reservoir were constructed, and the title to the land covered by water was acquired. The reservoir is known as Croton lake. It is a narrow, crooked body of water, about four miles in length. The different branches of the Croton are augmented by numerous smaller streams, and upon their banks and along the sides of the three branches are barn-yards, privies, pigsties, and other places where filth is collected and washed into the streams.

"These places for the collection and deposition of filth and putrefaction became so numerous and so extensive, and so polluted the water as to cause great alarm and anxiety among the inhabitants of the city.

"Scientific and medical skill united, in declaring the danger to health and life very great and very imminent, in addition to the demand for the adoption of some measure which might avert the peril by the removal of the cause. The legislature of the State, in March, 1893, passed an act entitled "An act to provide for the sanitary protection of the sources of the water supply of the city of New York, chap. 189, Laws of 1893." The mode of acquiring titles and the extinguishment of interests is prescribed in the law from section 2 to section 26, inclusive, and they are the usual constitutional methods. By section 27 of the act, the Commissioner of Public Works is authorized to take such measures as may be necessary to preserve from pollution and defilement all the sources of the water supply in the three counties already mentioned, and to enter upon all lands near, adjacent or contiguous to

any of the sources of water supply, and to abate and remove the cause of any such pollution or defilement. All damage and injuries to property occasioned by any act under that section are to be ascertained and paid in accordance with the provision of the previous section of the act.

"The great objection to the statute in question is, that it undertakes to vest the title to the property taken or injured in the city, before the final order for the confirmation of the report in the condemnation proceedings, but the objection is invalid. As law is settled in this State at the present day, it is within the competence of the legislature to authorize municipal corporations to take private property for public use without first making payment, provided a certain and adequate provision is made by which the owner can coerce compensation, through the judicial tribunals or otherwise, without unreasonable delay (2 Dillon's Municipal Corporations, § 615; Cooley's Constitutional Limitations, 692). The same question was presented and decided by the General Term, in this department, in the case of *The Mayor v. Wright*, 12 N. Y. Sup. 20, under a provision in the act for the construction of the new aqueduct, which was precisely like the provision in the statute, and it was there held, that the constitutional requirement of the compensation, was satisfied by a provision for certain and adequate payment, which can be made available by the owner. The same question was decided the same way in the *Matter of the Mayor*, 99 N. Y. 569.

"The plaintiff in this action owns about one hundred acres of land in the town of Carmel, and the middle branch of the Croton runs through the westerly portion of her farm from north to south. Her barn and horse-stables are on the east side of the stream, in close proximity to the bank, and her mansion is on the west side of the stream, a short distance from it. The drainage of her dwelling-house, including that of the water-closet, is let into the stream by a soil pipe, and is emptied there, and has been for many years. Upon the ascertainment of such facts, the Commissioner of Public Works directed the removal of the barn-yard, stables, pigsties and outside privies upon the premises of the plaintiff, and caused a cesspool to be constructed upon her land and the soil pipe to be conducted into the cesspool, so that the drainage from the house would run into it, and not into the stream of water. Thereupon the plaintiff commenced this action for the purpose of restraining defendant and its officers from further interference with her property.

"The plaintiff insists that the Commissioner of Public Works has no power to interfere with the plaintiff, a citizen of Putnam county, in

the enjoyment of her right to drain her premises into the running stream ; but that contention is faulty, first, because the plaintiff never had the absolute right, free from all restriction, to drain her sewage into the stream, as I have already stated. In the next place, it is not the Commissioner of Public Works who is interfering ; it is the legislature of the State that has interfered for the preservation of the public health.

“The case is novel. The city of New York has acquired the right to conduct the waters of the Croton river to that city for public use, and in all the statutes providing for the acquisition of land, or the extinguishment of riparian rights, it has been the declared purpose of the legislature to furnish the city of New York with a supply of pure and wholesome water. It must be assumed therefore that the city has the right to the water in its purity, free from all defilement, and fit for all domestic uses.

“It may be assumed that millions of people use this water in the city every year, and thus the public health and safety were jeopardized to an extent that justified the interposition of the legislature by virtue of the public power of the State to arrest the evil. The abatement of a nuisance detrimental to public health is one of the ordinary functions of the public power of the State, and the nuisance created by the plaintiff is of a flagrant character. That power is therefore adequate to afford an effectual remedy. *Renwick v. Morris*, 7 Hill, 575 ; *Fertilizing Co. v. Hyde Park*, 97 U. S. 667. The enormity of the offense will be more readily discerned if it be assumed that all the riparian proprietors within the Croton watershed have the right to commit the same nuisance as the plaintiff has perpetrated, and that the water is sent to the city freighted with the seeds of disease and death with which it would be thus contaminated. The disastrous results can hardly be conceived by the imagination.

“It is the apprehension of such evils, and to preserve the public health, and to avert the danger to human life, that the legislature has interfered for the sanitary protection of the sources of the water supply in the counties named. It is because the entire public is concerned. The Commissioner of Public Works is selected as the appointed executor of the statute, probably because he has the requisite machinery at his command for its execution. There seems therefore to be sufficient reason for permitting the Commissioner of Public Works to execute this law in the counties named therein.”

"So far as property right can be acquired in water actually appropriated to practical use for domestic and other purposes, such right has been acquired in the waters of the Croton river by the city of New York. The purpose is a public one, and the power to exercise the right of eminent domain for its acquisition, and for the acquirement of the land, and the extinguishment of rights necessary for its control and utilization, has been delegated to the mayor, aldermen and commonalty of the city of New York.

"The decision adds, in conclusion: "The statute provides a certain, definite and adequate mode of payment to the plaintiff for all damages she may sustain. It must be borne in mind that it is the intention and scheme of this act to pay for all property taken, for all injury or damage done, and for all rights extinguished.

"The enactment of the statute in question was a valid exercise of legislative power, and is not violative of the Constitution of the State or of the United States. Its execution ought not to be arrested by the courts."

The citations and use made of the New York Public Parks case,¹ of which the history is given at some length by Mr. Justice Finch in the opinion, have been many and various, but besides this in Mr. Justice Dykman's opinion, none perhaps more important than in *Sweet v. City of Syracuse*, respecting the use of the waters of Lake Skaneateles, and the latest consideration given to it, "In the Matter of the City of Buffalo." As the decision states, "the statute itself condemns and appropriates for the public use the precise lands selected by metes and bounds, so that every owner affected had means of knowing that his land was taken," and further, "upon the application of the city authorities or the commissioners the motion for confirmation (of an estimate) comes before the court which, after hearing any matter which may be alleged against such report, may confirm the same, or send it back for revision or correction, or appoint new commissioners to make a new appraisal. There is thus secured to the land-owner notice of

¹ *Matter of Application of the Mayor, Aldermen, etc., of New York to Acquire Title to Certain Lands for Public Park*, 99 N. Y. 576-590; *Sweet v. City of Syracuse*, 129 N. Y. 816; *In the Matter of the Application of the City of Buffalo to Acquire Lands and Property for Park Purposes, etc.*, 139 N. Y. 42; 99 N. Y. 581; chap. 189, Laws 1893, §§ 3, 22, 27; 129 N. Y. 327, 337. As to the acts of the Commissioner of Public Works, recited in the opinion, see the rule as to nuisances, p. 229, *ante*, and note 2 there; also *Seifert v. Brooklyn*, 101 N. Y. 136; *Morton v. Mayor*, 140 N. Y. 207; *People v. Board of Health*, 140 N. Y. 1.

the proceedings against him, and a double opportunity to be heard." The case itself shows the right of appeal. The law of 1893 provides a different system of condemnation and apparently limits the appeal making the conclusion of the Commissioner of Public Works in many respects conclusive. Some further differences also appear, and the creation of a public debt, and the mode of payment are discussed at length in the Park case.

The Sweet case was held to relate to State property, and a grant of a right to the use of water, and the court dismisses the complaint of a single tax payer that the execution of the law "would involve a culpable waste of municipal funds and property," on the ground that "the arrangement contemplated by the statute is one, which in the judgment of the legislature would be mutually, and equally advantageous to the city and to the State, and such a law is not within the reason or purpose of the constitutional provision," upon which the objections were based. In the Matter of the City of Buffalo, however, we have a nearer analogy and in respect to the discretionary powers of a municipal officer in condemnation of lands outside of the limits of the city there is this decision.

"The right to appropriate private property to public uses under the power of eminent domain is subject to certain limitations imposed by the State Constitution, restricting the power of the legislature, which secure to the property holder the right to have all questions which are referred to a tribunal determined by one possessing vested jurisdiction over him and his estate.

"The power to select or locate the lands may be delegated, but the proceedings for determining the question of just compensation are judicial in their nature, and must be conducted in a court having jurisdiction over the subject-matter.

"Where therefore property outside of a city is sought to be condemned for municipal purposes, the legislature has no power to delegate the determination of the question as to compensation, to a local court possessing no extra-territorial jurisdiction.

"The provision of the State Constitution, as amended in 1869 (Art. 6, § 12) continuing the Superior Court of Buffalo and certain other local courts, with the powers and jurisdiction they then severally had, "and such further civil and criminal jurisdiction as may be conferred by law," does not give, or authorize the legislature to confer, jurisdiction upon said Superior Court over the owner of lands situate outside of the city limits.

"Accordingly held, that the provisions of the act of 1887 (chap. 557, Laws of 1887), authorizing the Park Commissioners of the city of Buffalo to select and locate lands for park purposes, so far as they authorized said commissioners to apply to said Superior Court for the appointment of commissioners to appraise the value of lands so selected outside of the city limits belonging to a non-resident, were inoperative and void; and so, that an order of said court appointing commissioners in such case was void."

We may not do better than follow the unanimous opinion of the court in this case, that "the exercise of the undoubted right to appropriate private property for public uses, under that power of eminent domain which resides in the legislature as representing the people of the State, is subject to certain limitations imposed by the Constitution, and restricting the powers of the legislative body, and which operate to secure to the property-owner the right to have all questions which are referred to a tribunal, determined by a tribunal which is competent, as possessing the vested jurisdiction over him and his estate." Approving the reasoning in *Monongahela Navigation Company v. United States*, and referring the Matter of Mayor of New York, cited above, the court adds: "When the legislature has authorized an appropriation of private property for public purposes, and remits the matter of compensation to the court, it intends that a proceeding judicial in its nature shall be set on foot in which every question may be raised by the land-owner, and then and there determined which affects his rights."

Police powers and laws indeed were of little avail, if the welfare of the individual, were not conceived to be the foundation and the assurance of the public good. No public policy, which neglects personal and private rights, could stand very long in a well-ordered community. The law of self-defense, which is one of the bases of police laws upon the side of society organized in the State, must be recognized for all members of that society, and for every citizen, within the appropriate limits which are fixed only for the purpose of preventing encroachments on either side, on that of the government or on that of the subject.

¹ 189 N. Y. 429, 481; *Monongahela Nav. Co. v. U. S.*, 148 U. S. 327; *Dill. Mun. Corp.*, § 619; *People, ex rel. Copcutt, v. Bd. of H. Yonkers*, 140 N. Y. 1.

CHAPTER XX.

URBAN ADMINISTRATION. VESTING OF EXCLUSIVE POWERS.

Of necessity urban administration of police laws differs from that of a village, and more from that of the open country. This difference increases in degree until we reach the metropolis which has a life by itself. The crowded interests and constant encroachments upon each other; the very changes in water, air and food, the aliments of life in the city, which are hardly to be recognized, as those from the mountains, pastures and fields; the minute and extended inspections; the vigilance, skill and power of prevention needed; the force and speed essential for adequate relief; the march of disease; pestilence leaping with flying steps from a foreign port to the gates of the city, or lifting its head within the walls racks as by fire the habitations of one or more streets, while to the hamlet it creeps along familiar ways, and every foot of its slow progress may be told by ordinary watchmen; all the pressure, immensity and diversity of the work of the metropolis produces an unique character, and its law, like all its belongings, must be suited to it. One example will suffice. In a village or smaller town one tenement-house would be a monstrosity. In the city of New York thirty-six thousand tenement-houses have become a continuing necessity. The tenement-house legislation of New York, beginning in 1867, applied therefore only to the metropolitan district.¹

The Public Health Act of England in 1875 was not to extend to Scotland or Ireland, nor, save as expressly provided, to the metropolis. England, except the metropolis, is divided into urban sanitary districts and rural sanitary districts. The urban authority was constituted in the mayor, aldermen and burgesses acting by the council; in the improvement commissioners; in the local board; and to every local board and any improvement commissioners being an urban authority

¹ N. Y. L. 1867, chap. 906; the Public Health Act, Eng., 38 and 39 Vict.: 1875, L. R., chap. 55, p. 346; an act to consolidate and amend the laws relating to public health in London, L. R., 54 and 55 Vict., 1891, chap. 76, p. 476.

and not otherwise incorporated, corporate powers are granted, a seal and rights to sue, and to hold lands without any license in mortmain for the purposes of this act. There is a further explanation of the "authorities for the execution of the act" in its second part, the first part being occupied in definitions and references to preceding statutes.¹ It says: "Improvement act district, constituted such before the passing of this act, and having no part of its area situated within a borough or local government district. Local government district, constituted such, either before or after the passing of this act, having no part of its area situated within a borough or improvement act district, and for the purposes of this act the boroughs of Oxford, Cambridge, Blandford, Calne, Wentlock, Folkestone and Newport, Isle of Wight, shall not be deemed to be boroughs, but included in the improvement act district, the local government district, and the urban district, as respectively specified. In the third part of the act, sanitary provisions are enacted in one hundred and thirty sections, covering a great variety of topics; penalties are provided for their violations, and their enforcement is laid upon the local authority in any district. All regulations and orders made by the local government board shall be published in the London Gazette, and such publications shall be conclusive evidence thereof for all purposes. There is a reservation of general powers however in several places, as *e. g.* "the local government board may from time to time make, alter and revoke such regulations as to the said board may seem fit, with a view to the treatment of persons affected with cholera or any other epidemic, endemic or infectious disease, and preventing the spread of cholera and such other diseases as well, on the seas, rivers and waters of the United Kingdom, and on the high seas within three miles of the coast thereof as on land; and may declare by what authority or authorities such regulations shall be enforced." Police regulations are that "the provisions of the Towns

¹ These definitions include that of "borough" and reference is to 5 and 6 William IV, chap. 76. "Metropolis means the city of London and all parishes and places mentioned in schedules A, B, C, to the Metropolis Management Act, 1855; Bakehouse Ventilation Act, 26 and 27 Vict., chap. 40; Artisan and Laborers Dwellings Act, 81 and 82 Vict., chap. 130; Laboring Classes Lodging Houses Act, 29 and 30 Vict., chap. 28; 30 and 31 Vict., chap. 28; Summary Jurisdiction Acts, mean chap. 43, 11 and 12 Vict. intituled "An act to facilitate the performance of justices of the peace out of Sessions within England and Wales with respect to summary convictions and orders." "Improvement Commissioners" mean any commissioners, trustees or other persons invested by any local act, with powers of town government and rating.

¹ *Id.*, § 130.

Police Clauses Act, 1847, with respect to the following subjects, shall be incorporated in the act, viz.: Obstructions and nuisances in the streets; 2, with respect to fires; 3, with respect to places of public resort; 4 hackney coaches; 5, public bathing.¹

By-laws made by a local authority shall be under their common seal, and shall be published as prescribed in the act. Penalties may be fixed not exceeding five pounds. A limitation of six months for complaints is made; legal proceedings are regulated.

"All offenses and penalties except as otherwise provided for, may be prosecuted in the manner directed by the Summary Jurisdiction Acts before a court of summary jurisdiction." This court is of two or more justices, or some magistrate or officer empowered to act alone. Where the application of a penalty under this act is not otherwise provided for, one-half thereof shall go to the informer. The sanitary authority of the whole, or part, of any port, may be constituted by a provisional order of the local government board.² "The mayor, aldermen and commons of the city of London shall be the port sanitary authority of the port of London, and shall pay out of their corporate funds all their expenses as such port sanitary authority." "A port sanitary authority may, with the sanction of the local government board, delegate to any riparian authority within or bordering on their district, the exercise of any powers conferred on such port sanitary authority, but except in so far as such delegation may extend, no other authority shall exercise any powers conferred on a port sanitary authority by the local government board. The performance of their duty by the local authority can be enforced through the local government board, either through a writ of mandamus or by the appointment of a person to perform the duty, whose expenses, including remuneration and costs of the proceedings, shall be paid by the authority in default, and any *order for the payment of such expenses and costs may be removed into the Court of Queen's Bench, and be enforced in the same manner as if the same were an order of such court.*" Any by-laws inconsistent with the act are to be deemed repealed.³ Saving clauses are added, and in schedules infinite details even as to rules of meetings and proceedings, and powers drawn from previous statutes, with blanks and forms. There will be seen

¹ Id., § 171, police regulations; id., § 183; Part VII, legal proceedings, §§ 251, 254.

² Id., §§ 287, 289, 291.

³ Id., § 299.

⁴ Id., § 815; schedule V, part 8, 24 and 25 Vict., chap. 61, § 21; 35 and 36 Vict., chap. 79, § 35.

throughout how universally the imperial central authority is preserved in its supervisory, as well as law-giving forms; also the careful discrimination between all other cities and all other ports, and London; and further, the preservation of old acts and forms, as in that "any urban authority constituted a burial board may from time to time repair and uphold fences surrounding any burial ground," etc., and that "the power and duties of the Board of Trade under the Alkali Act, 1863, shall be exercised and performed by the local government board." It was however a magnificent provision, with ample though complicated machinery, for the protection of vital interests and sanitary safeguards in English cities, and readily and constantly enforced.¹

The Act of 1891 to consolidate and amend the laws relating to public health in London, provides first a general description of nuisances, and such as shall be dealt with summarily under the act, and on the receipt of information respecting the existence of a nuisance liable to be dealt with summarily, the sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act or default or sufferance the nuisance arises or continues, or if such person cannot be found, upon the occupier or owner of the premises, requiring him to abate the same within the time specified in the notice, and to execute such works and do such things as may be necessary for that purpose, and if the sanitary authority think it desirable (but not otherwise) specifying any works to be executed.

"Under certain circumstances the sanitary authority may themselves abate the same, and may do what is necessary to prevent the recurrence thereof." A penalty is provided and there may be "a prohibition order," and for dwelling-houses "a closing order" to prevent its use for a human habitation. Section 108 of the Public Health Act, 1875,² set out in the first schedule of the act, shall continue to extend to London, with the substitution of a sanitary authority under this act, for any nuisance authority mentioned in the said section, and any reference in that section to a nuisance in the metropolis, shall include a nuisance within the meaning of this act. By-laws by sanitary authority and county council as to cleansing streets and prevention of nuisances are authorized.

¹ See chap. VII and cases, note 2, p. 142, *ante*; L. R., 54 and 55 Vict., chap. 76, p. 476, §§ 1-161.

² See L. T. R., 1891, 54 and 55 Vict. pp. 538, 539; also §§ 115, 130, 184, 140, 182, 186, 203, 206 are maintained as to cholera, etc.; see 52 and 53 Vict., chap. 64.

Offensive trades,¹ smoke consumption, work-shops and bake-houses, dairies, removal of refuse, regulations as to water-closets, unsound food, provisions for water, infectious diseases, notification and prevention, hospitals and ambulances, prevention of epidemic diseases, mortuaries, by-laws as to houses let in lodgings, tents and vans, and underground rooms are separately treated and regulated. The description of a sanitary authority in the act is given with reference to the *Metropolis Management Acts* and their schedules. For the city of London the commissioners of sewers are the sanitary authority.² In each of the parishes described in the schedules, the vestry of the parish; in each of the districts mentioned in further schedules referred to, the district board. In the parish of Woolwich, the local board of health. In any place mentioned in schedule C, the board of guardians, or overseers of the poor.³ The sanitary authority appoints committees, officers and inspectors, can borrow money, acquire and hold land, issue orders, make by-laws and sue. The county council has power to prosecute in default of the sanitary authority, and the local government board may take proceedings on complaint by the county council of the default of the sanitary authority. The Metropolitan Asylum managers and the police have some concurrent duties and powers with the sanitary authority in respect to certain matters, acts and things. Thus, where a person suffering with any dangerous infectious disease is in hospital, and would not, on leaving, be provided with suitable lodging, a justice may direct his detention in hospital at the cost of the Metropolitan Asylum managers, and enlarge the time, and the detention may be car-

¹ The city of London Sewers Act, 1851, 14 and 15 Vict., chap. 75, and Whitechapel Improvement Act, 1853, 16 and 17 Vict., chap. 141, are maintained, §§ 2, 8 and 8, and in like manner by § 26, sections of the Factory and Work-shop Acts and Amendment Act, 41 Vict., chap. 16; 46 Vict., chap. 53; see 54 and 55 Vict., chap. 75; § 71 preserves sections of the Contagious Diseases Animals Act, 1878, 1886, 41 Vict., chap. 74; 49 Vict., chap. 72.

² *Id.*, § 99; see 18 and 19 Vict., chap. 120; 25 and 26 Vict., chap. 102; § 94 is not to apply to common lodging-houses within the Common Lodging-houses Act, 1851, and acts amending it; 14 and 15 Vict., chap. 28; 16 and 17 Vict., chap. 41. As to Artisans and Laborers Dwellings Improvement Acts, see 31 and 32 Vict., chap. 180; 1875, 38 and 39 Vict., chap. 36; 1876, 39 and 40 Vict., chap. 200; Whitechapel and Limehouse Schemes, 1879, 42 and 43 Vict., chap. 80; 1880, 43 Vict., chap. 8; 1882, 45 and 46 Vict., chap. 54; 1885, 48 and 49 Vict., chap. 72, Housing of Working Classes; 1886, 49 and 50 Vict., chap. 112, powers conferred on Metropolitan Board of Works; 1883, 46 and 47 Vict., chap. 85, Diseases Prevention Act Metropolis.

³ §§ 19, 20, 48, slaughter-houses erected under authority of the Metropolitan Market Act, 1851, 1857, are not affected. The rights of water companies are maintained, and sections of the Metropolis Water Act, 1871, are followed, 34 and 35 Vict., chap. 113.

ried into effect by any sanitary authority, any inspector of police, or any officer of the hospital; but inspections are by officers under the sanitary authority, and the execution of orders may be intrusted by the court to any constable or other person to do all other necessary acts. Any sanitary authority may provide temporary or permanent hospitals, and the Metropolitan Asylum managers also support their hospitals.¹ The latter officers also shall continue to maintain their wharves and landing places, vessels and carriages for the transportation of persons sick with any dangerous infectious disease, and they may also allow the conveyances with the necessary attendants to be used by other officers for a like purpose and make a reasonable charge therefor.² They may also hire any hospital, infirmary, asylum, or work-house for cholera patients.

"The port sanitary authority of the port of London continues to be the mayor, commonalty and citizens of the city of London," but duties, powers and obligations may be assigned to them by the local government board. The sections of the Public Health Act relative to cholera, and other epidemic diseases are extended to London. The act is modified in its application to the city of London as follows: "(a) There shall be two appeals from the commissioners of sewers to the county council. (b) The bye-laws made by the county council shall not extend to the city. (c) The county council shall not have power to require the commissioners of sewers to provide and maintain a building for *post-mortem* examinations. (d) The powers of the county council to proceed in case of default of a sanitary authority shall not extend to the commissioners."³ It is an interesting detail of the legal proceedings clauses that, with the right of entry conferred for purposes of examination of premises, "*the person so claiming the right to enter shall, if required, produce some written document properly authenticated on the part of the sanitary authority, showing the right of the per-*

¹ Id., § 67; see Met. Poor Act, 1867, 30 Vict., chap. 6, § 8. "For the asylum or asylums of each district there shall be a body of managers constituted as in this act provided, which managers and their successors are hereby incorporated by the name of The Managers of the Asylum District, and by that name shall be one body corporate, with perpetual succession and a common seal and with power, subject and according to the orders of the Poor Law Board, to take, hold and dispose of lands and other property for purposes of the asylum district," etc., partly elected, partly nominated.

² L. R., vol. II, 1867, 30 and 31 Vict. 48, § 79; see §§ 85, 86.

³ Id., §§ 111, 112.

⁴ City of London, id., §§ 133-136; id., § 115.

son producing the same to enter, and in case of refusal, in addition to the penalty provided, a justice may issue a warrant authorizing the entry by force, if need be, of the sanitary authority with such assistants as may be required to execute their duties under the act." Sufficient has been given of this law to show its system, but the one hundred and forty-first section containing the interpretation of terms,¹ is necessary for its intelligent comprehension. The elaborate notices of laws affected, the schedules attached, and the blanks and forms therein provided for the law as enacted, are most useful and necessary for reference in any examination of its methods.

Turning now from the English to the American Metropolitan system, we find everywhere the pressure and exhausting power of great cities upon the surrounding country, and as greater and greater interests were involved, as the cities filled to overflowing, and the towns, villages and farms were rendered to a greater degree dependent upon them not merely for the markets, but in many ways, and often even for a supply of labor; a process less marked abroad than in the United States; so called metropolitan laws, or metropolitan district laws were passed. There were a number of such laws in the State of New York, and in other States,² notably Massachusetts, Illinois and Ohio. In the latter State the classification of villages, towns and cities is very complete by the Revised Statutes. But it is not of this we speak. It was

¹ *Id.*, § 141, among the definitions are: London, the administrative county of London; "premises includes messuages, buildings, lands, easements and hereditaments of any tenure whether open or inclosed, whether built on or not, and whether public or private;" house includes schools, factories and the buildings; building and house includes the curtilage; the expression "house refuse" means ashes, clinders, breeze rubbish, night-soil and filth, but does not include trade refuse; trade refuse means the refuse of any trade, manufacture or business, or of any building materials; street refuse means dust, dirt, rubbish, mud road scrapings, ice, snow and filth; source of water supply means any stream, reservoir, aqueduct, pond, well and cistern, pump, fountain, etc.; sanitary convenience includes urinals, water-closets, earth closets, privies; day means the period between six o'clock in the morning and the succeeding nine o'clock evening; cistern includes water butt; dairy includes any farm, farm-house, cowshed, milk store, milk shop or other place from which milk is supplied or in which milk is kept for sale.

² Act of April 15, 1857, chap. 369; *People v. Draper*, 15 N. Y. 532; chap. 74, 1866; *Metropolitan Board v. Heister*, 37 N. Y. 661; N. Y. L., chap. 335, 1873; see Mass. Met. Sewerage Act of 1889, chap. 489; *Kingman Petition*, 156 Mass. 361; see, also, Gen. Stat. Mass., chap. 365, 1870; chap. 167, 1871; 1 R. S. Ohio, 313, 345; see 49 Ohio St. 202, 229, 586.

held in *The People v. Draper*¹ that while under the Constitution the established divisions of the State into counties, towns and villages must have its "free course unobstructed and unembarrassed by legislation," yet the State for the purposes of a practicable government, might resume in favor of the central power, a portion of the jurisdiction of local divisions, or change the partition of it, and that: "It is the business of the legislature to adjust, in the interest of the whole people of the State, the distribution of the powers of government, taking care that no direct provision of the Constitution is violated, and that no arrangement which it has made is immediately disturbed. We do not find that an organization like the metropolitan district is anywhere forbidden; and we are unable to see that any arrangement of the machinery of the government which the Constitution has provided will be impeded or disturbed by the execution of the act. We conclude, that the act is constitutionally valid, so far as this object is concerned." Or as it was subsequently stated² the legislature may at its discretion, recall to itself, and exercise so much of the powers it has conferred upon municipal corporations, as are not secured to such corporations by the Constitution.

Doubtless, the State also may add, under the same limitations, as it has done in police matters, metropolitan sewerage, and quarantine districts; as it has done in the water rights laws all over the land, whereby a distant watershed is practically converted to the use and needs of the people gathered in a large city, to whom are conveyed from outlying regions, their potable water supply through other counties and towns, and by right of way condemned in the name of the State, but for a single use that of the city district.

The limitations of the early cases are also preserved, and no other division of organization is allowable, unless there is adequate occasion for the exercise of legislative discretion, and "the purpose cannot be accomplished by organizing the territory in view under one of the forms of municipal government authorized by the Constitution."³ As was said in *People v. Porter*, the Constitution does "not authorize the legislature, to carve out from the territory of the State, a district for judicial purposes, not bounded by county, town or village lines," etc.

¹ 15 N. Y. 542, 548; *People v. Met. Bd.*, 19 N. Y. 188; *Met. Bd. v. Barrie*, 34 N. Y. 657.

² *People v. Pinckney*, 32 N. Y. 377.

³ *People, ex rel. Bolton, v. Albertson*, 55 N. Y. 51; *People, ex rel. Townsend, v. Porter*, 90 N. Y. 68.

Our view is of the extension of jurisdiction to quarantine limits as of the port of London, or port of New York; but more particularly, the conveyance by the State to parts of the city government exclusive and sovereign powers, as to the Health Department of the city of New York.¹ This would be unnecessary, and tend to trouble and discontent in a smaller place. Hence is that exception we find in State Health Laws, of districts which approach in magnitude of the interests involved, those necessarily to be considered in any metropolitan system. It may be assumed that no more complete, self-contained, comprehensive and successful, yet simple system prevailed than in the city of New York, so long as it could be held to the original plan of 1866 perfected in 1873.

The cholera invasion of preceding years aroused the public spirited and scientific minds of the community, to the inadequate protection existing in 1865 and 1866, for the preservation of life and health at the entrance gate of the whole country, the city and port of New York. It was seen that powers imperial, in grasp, and in celerity and certainty of action, alone could meet the expected emergency, and that neither division of councils, nor selfish obstruction by interested litigants using ordinary forms of court, and issues of fact framed for jury trials, for delay, should stand in the way of their exercise, when time was so important an element to success, and extraordinary skill and scientific research and discretion must be invoked. The perils were great in proportion to the masses of population suddenly exposed to them. The laws of 1866 and 1867,² established the new plan, and it was continued under the title of a Metropolitan system until 1870, but rearranged, and a more concentrated authority and a more effective administration secured by the law of 1873, whereby "the authority,

¹ *Polinsky v. People*, 78 N. Y. 65; *Health Department v. Lator*, 38 Hun, 543. The recent cases of *Board of Health v. Copcutt* and *People, ex rel. Copcutt, v. Board of Health* (Yonkers), 140 N. Y. 1, 12, hold that the determination of the Board of Health that a nuisance exists is not conclusive, and that in a case of doubt whether a nuisance exists the board should proceed by action (see, also, *Hutton v. City of Camden*, 84 N. J. L. 122). This however is under different laws and the same statutory process is not provided as for the New York Board of Health, but only ordinary powers are granted. See the organization of Yonkers Board of Health and powers, chap. 184, N. Y. L., 1881, tit. 9, §§ 2, 3; chap. 270, 1885, § 3. In the first-mentioned case however an ordinance of the Sanitary Code is sustained, and the court says the board may act on its own inspection and is not required to give notice before exercising its jurisdiction. "Its determination is not reviewable on *certiorari*. See *Werner v. City Council of Charleston* (S. C.), U. S. Sup. Ct., Jan. 23, 1894, 151 U. S. 860.

² N. Y. L., chap. 74, 1866; chap. 956, 1867; chap. 187, 1870; chap. 335, 1873.

duties and powers conferred or enjoined upon the Metropolitan Board of Health, by chapter 74, in 1866, and the several acts amendatory thereof, and by many other subsequent laws of this State, and upon the several officers and members of said board" were conferred upon and vested in or enjoined upon, and hereafter to be exclusively exercised in the city of New York, by the Health Department and Board of Health created by this act, and the officers of the said Board of Health and the said Health Department.¹

The development had been as gradual as in the city of London. In 1657 was the government of the Schout, Burgomaster and Schepens, and ordinances were adopted after the forms and requirements of the Holland council and the city of Amsterdam. The Mayor's Court up to the time of the Dougan charter, like the board of burgomasters, etc., under the Dutch rule, united the functions of council for the regulation of the municipal affairs, and of a court of justice, with legislative and judicial matters equally before it;² but thereafter a common council began its office, and many of the sanitary and port regulations afterward carried into those framed under the Revised Statutes of the State, may be traced to those originating and enforced, because of the occasion for them in the early days of New York. At all events there is nothing new in the combination of legislative, executive and judicial functions, which have now been centered in the Health Department of the city of New York, as a *quasi* corporation, and in many respects an independent part of the municipal government. The Commissioners of sewers in like manner in London came gradually to have in their hands many diversified and sometimes it would seem incongruous powers.

The Revised Statutes³ of the State of New York, in the fourteenth chapter, "Of the public health," prescribes in five titles the officers and duties of the Board of Health, of which it says: "There shall continue to be a Board of Health in the city of New York, of which the mayor shall by right of office be president, and the members of which shall from time to time be appointed by the common council of the

¹ N. Y. L., chap. 757, 1873, § 12; chap. 835, art. 11, §§ 80, 81, 82; chap. 686, 1874; chap. 685, 1874; chap. 956, 1867; Tenement-house L., chap. 908, 1867; see chap. 70, 1867; N. Y. Cons. Act, 1882, chap. 12, §§ 533 to 667, 501, 1089, 1091, 1441, 1449, 1936; chap. 450, 1881; chap. 84, 1887; chap. 40, 1883; chap. 175, 1885; chap. 454, 1885; Penal Code, §§ 288, 385, 397, 407, 408, 434, 439, 662.

² Jud. Organ of State, 1 E. D. S. 26, 27, 28, 47; N. Y. Rec. Burg. & Schep. 414, 484, Ordinances of Burgomasters.

³ 1 R. S. of N. Y., chap. 19, tit. I, II, art. 2, 5; tit. III, art. 1, 2, 3; see chap. 275, 1850; 1 R. S., tit. IV, V.

city. The health officer, resident physician, and health commissioner of the city shall be the commissioners of health." At first there were united with these provisions those for "quarantine, and regulations in the nature of quarantine in the port of New York." Large discretionary powers were conferred, and heavy penalties for violation of regulations adopted, were authorized by these laws. The Board of Health was composed in 1866¹ of the four police commissioners, four commissioners of health, one of whom was to be a resident of the city of Brooklyn, which was then in the Metropolitan district, the health officer of the port, and the mayor of the city. By the charter of 1870 the same officers, with the exception of the mayor, were placed at the head of the Health Department then created, having enjoined upon and vested in it, all the powers and duties of preceding boards and officers which it replaced.

Already by this time a code of municipal sanitary laws had been adopted, sanctioned by the legislature, and recognized in subsequent laws and by the decisions of the courts under the title of the Sanitary Code,² of which a violation was a misdemeanor, and the Board of Health could add and amend and publish sections of this code as it should find advisable. The department had its own attorney and counsel, power to bring suits, and a fund. It could also declare a nuisance by certain prescribed³ statutory action, enforce the proceedings by abatement, vacate houses, and with the approval of the Governor issue a proclamation, and use extraordinary means of defense against pestilence, in any time of great and overwhelming peril. These proceedings in no wise depended on, but were throughout distinct from either the Sanitary Code, or the ordinary civil and judicial administration in the city, and the Board of Health was required "so far as practicable to enforce all laws of this State, applicable in said district, to the preservation of human life, or to the care, promotion, or protection of health; and said board may exercise the authority given by said laws, to enable it to discharge the duty hereby imposed; and this section is intended to include all laws relative to cleanliness, and to the use or sale of poisonous, unwholesome, deleterious, or adulterated drugs, medicine, or food.

¹ N. Y. L., chap. 74, 1866, § 2; chap. 137, 1870, art. 11, of the Health Department; chap. 333, 1870, § 93.

² N. Y. L., chap. 956, 1867, § 19; chap. 335, 1873, § 82; chap. 636, 1874, § 15; *Schrumpf v. People*, 14 Hun, 10, 13.

³ N. Y. L., chap. 74, 1866, see § 12, especially § 14, par. 1, 2, §§ 16, 17, 19, 20, 24, 30, 31, 32; chap. 956, 1867, §§ 5, 7, 11.

And said board is authorized to require reports and information (at such times and of such facts, and generally of such nature and extent, relating to the safety of life and promotion of health as its by-laws or rules may provide), from all public dispensaries, hospitals, asylums, infirmaries, prisons, and schools, and from the managers, principals, and officers thereof; and from all other public institutions, their officers and managers, and from the proprietors, managers, lessees, and occupants of all theatres and other places of public resort or amusements in said district; but such reports and information shall only be required concerning matters or particulars in respect of which it may, in its opinion, need information, for the better discharge of its duties in said district. And it is hereby made the duty of the officers, institutions, and persons so called on, or referred to, to promptly give such information and make such reports, verbally, or in writing, as may be required by said boards. And it is hereby further made the duty of all persons, officers, and boards, to make to said Board of Health the reports and returns, and to give the information and afford to said board the aid and facilities which by law or ordinance they or any of them were required to make, afford, or give to any person, officers, or board, when any powers hereby conferred on said Board of Health was exercised by any other officer or board." The duty was laid upon the Board of Police to systematically enforce the ordinances of the Health Department, and also upon the direction of the Board of Health in writing duly authenticated, to faithfully execute through its proper officers, agents and men, the orders and sanitary regulations prescribed.¹

Little more was now necessary than to have the board so composed and organized as to secure a comprehensive, intelligent, independent, discreet, consistent and forcible action, with a unity of purpose, without obstruction either from the weight of its own numbers, or from the outside. No preliminary injunction could be granted against the board, or its members, or officers, except by the Supreme Court of the State upon a notice of eight days, together with copies of the papers upon which the motion is to be made.² The final change was made by the charter of the city of 1873, and by the auxiliary acts of 1873

¹ N. Y. City Cons. Act, 1882, §§ 261, 296; Health Dept. v. Police Dept., 41 Superior Ct. 823.

² N. Y. L., chap. 956, 1867, § 9; chap. 835, 1873; chap. 757, 1876, § 12; chap. 636, 1874. See N. Y. L. 1882, chap. 410; N. Y. City Cons. Act, §§ 261, 296, 501, 533-648; title 7, Tenement and Lodging houses, id., §§ 649, 667; id., §§ 1084, 1091, 1441, 1449, 1936.

and 1874. The organization then effected, and the system then adopted, were embodied in the New York City Consolidation Act of 1882, to which statute and its amendments reference must be had, especially to Chapter XII, Department of Health.

The Tenement-house Commission appointed by the legislature to report amendments deemed essential to the Tenement-house Law was enabled to report, and see its suggestions adopted in 1887 in the eighty-fourth chapter of the laws of that year, adding much efficiency to this division of sanitary work, which had advanced very rapidly after the law of 1880 limiting the areas, prescribing the rules, and arranging for supervision of the plans of tenement and lodging-houses, and after the law of 1881, which placed the plumbing and drainage of all buildings under sanitary regulation. It also provided for reconstituting the sanitary company of police, of whom fifteen should be exclusively employed for the enforcement of the laws relating to this class of houses, and all should be under the direction of the President, and the Board of Health.¹

A salutary provision inserted subsequently, that "no building or premises while occupied for a tenement-house shall be used for a lodging-house, private school, stable, or for the storage and handling of rags,"² was afterward rendered nugatory; and throughout the legislation on these subjects in 1891, 1892 and 1893, there was a set-back until finally the supervision of plumbing and drainage of buildings, and the regulation of their construction, building plans, models and appurtenances, were wrested from the Health Department, the value of its precedents and experience to a certain degree neglected, and the sanitary system consecutively pursued since 1867, was so far interrupted and superseded.

In the system of 1873 a smaller number of commissioners, all necessarily connected with, and cognizant of, the executive work of the Health Department, made up the Board of Health. They were four; two commissioners of health, one of whom must have been a practising physician for not less than five years, and a commissioner of health not

¹ See N. Y. Cons. Act, §§ 649, 653, 657, 658, 661, 662, 664, 666, 501, 296; see N. Y. L. 1879, chap. 879; 1880, chap. 399; 1881, chap. 456; 1890, chap. 204; N. Y. Cons. Act, § 661; N. Y. L., chap. 211, 1889, amending § 653.

² N. Y. L., chap. 486, 1890, amending § 663, N. Y. Cons. Act; N. Y. L., chap. 39, 1891, amending § 663; N. Y. L., chap. 204, 1891, amending § 661; N. Y. L., chap. 238, 1892, amending § 661; N. Y. L., chap. 329, 1892, amending § 667; N. Y. L., chap. 275, 1892, Dept. of Buildings created; N. Y. L., chap. 602, 1892, plumbing and drainage; N. Y. L., chap. 187, 1893, as to § 556.

a physician, who was to be the president of the board; two *ex-officio* commissioners, the health officer for the port of New York in whose hands was the quarantine administration of the port, and the president of the Police Department whose duties were in co-operation with, and to support the Health Department.¹ They united every function both directly connected with, and auxiliary to, the exercise of the very large administrative and discretionary powers vested in this commission.

With *quasi* corporate rights² of independent appearance, and representation, in every proceeding or action in which any order, regulation and action of the board, or of any one acting pursuant to its authority shall be called in question; the right to bring suits; judicial notice of its seal and orders prescribed by law; the declaration that "the action, proceedings, authority and orders of said board shall at all times be regarded as in their nature judicial, and be treated as *prima facie* just and legal;" the authority vested in it to adopt and amend by-laws, rules and regulations; resistance to its proper orders made a misdemeanor; with a sufficient force of every class of men needed for the details of inspection and of department work; exclusive charge given to it of the care of persons sick with contagious and infectious diseases, and the hospitals for them; with the right given to order a ship from the docks, or to prevent the landing of persons or articles from it, if infected by disease; with extraordinary powers given in any time of great peril of pestilence; the charge of tenement and lodging-houses enjoined upon it; the right, after it had adjudged any place, matter or thing a public nuisance, to order its abatement, and to summarily execute by its own agents and means such order if necessary; the regulation and control of offensive trades committed to it and connected therewith, necessarily the prevention of nuisances from railways and factories; a great charitable and preventive work annually intrusted to its offices, of house-to-house visitation by department physicians of poor families in tenements needing medicine and medical care; with records of every inspection preserved since 1866, and a ledger account kept with every tenement-house, showing its history and sanitary experience since it was first turned to such use; with an annual appropriation made for it on its own estimate of expenditures as approved by the Board of Estimate of the city, so that funds should not be wanting for its necessary work;³ with the right to call upon the whole

¹ N. Y. Cons. Act, § 41; chaps. 335, 1873, § 80; chaps. 636, 874.

² N. Y. Cons. Act, §§ 616, 618, 620, 621, 622, 623, 549.

³ Id., §§ 189, 205.

police' force of the city, as it were a *posse comitatus*, as it actually was in 1873 when the Board of Health took possession of the block in which was Washington Market, and tore down and removed the sheds and buildings which projected over the gutters of the street and made a nuisance; with a process devised for certain matters, wherein the board was constituted practically a court, gave due hearing to every one affected by its proceedings, and judicially decided the issues before it, thus avoiding the delays of jury trials in sanitary cases; without any interference from co-ordinate parts of the city government, or other authority in its use of the highest and most imperative discretionary authority, so long as the same was not unreasonable or oppressive; nothing stood in the way of the successful administration of the sanitary laws of this city.

It only remains to consider its methods, and process, which are of interest to the citizen complaining, to him complained of, and to the larger public, of whom they all are part.

It has been a distinctive feature of the procedure of the Health Department, that it was always based upon its own complaints and reports, while it was required "to use all reasonable means for ascertaining the existence and cause of disease or peril to life or health, and for averting the same throughout said city," and to communicate such information "with such useful suggestions as the experience of said board may supply." Inspection upon any and every complaint was at once made by an official inspector, and reports entered, filed and reinspections ordered; reports thereof and of compliance with or resistance thereto, were made in regular sequence to the Board of Health.

Summary process was possible in two contingencies; to vacate a building or house upon the certificate¹ of the sanitary superintendent, and a resolution by the board, because dangerous to life or unfit for human habitation; and again, "wherever any building, erection, premises, business pursuit, matter or thing, or the sewage, drainage or ventilation thereof in said city shall, in the opinion of said board, as a whole or in any particular, be in a condition or in effect dangerous to life or health," then an order to abate that declared to be a public nuisance, issues from the Board of Health, and a hearing, if demanded, is accorded to parties served with the order, whereupon, after due op-

¹ N. Y. Cons. Act, §§ 296, 594.

² N. Y. Cons. Act, §§ 571, 572, 573; chap. 74, 1866, §§ 15, 16; N. Y. Cons. Act, §§ 592, 597.

³ Id., 659; id., § 535, par. 1, 2.

portunity afforded to be heard, the said Board of Health, entering all the proceedings in its minutes, reconsiders the matter, decides the material issues, rescinds, modifies or affirms the original order, and takes measures to immediately carry its decision into effect. By this process it has torn down buildings, shut off offensive trades, closed dwellings, and factories, and removed ships.

Ordinarily, in regular routine, the provisions of the Sanitary Code may be said to enforce themselves. Any violation of their terms is to "be treated and punished as a misdemeanor, and the offender shall also be liable to pay a penalty of fifty dollars, to be recovered in a civil action in the name of the Health Department of the city of New York before any justice or tribunal in said city having jurisdiction of civil actions."¹ Recently the law was changed to require actions to be brought in the District Court of the district of the city where the violation occurred.

The distinction was made in practice, that adulterations of food, and nuisances of certain classes, such as overcrowding in lodging-houses, or faults in plumbing and drainage, were complained of by inspectors before a police magistrate, whose warrant began the process. Other offenses were made the subject of the ordinary suits for penalties, wherein only the fact was at issue of a violation of the Sanitary Code. In other cases of nuisance, at the discretion of the Board of Health, abatement suits might be instituted, an injunction issue upon the complaint of the board, and when judgment was reached a lien could be filed upon the property affected, under regular process of the courts. Upon its presentment also cases were laid before the grand jury for indictment, especially where the origin or cause of the nuisance was in another county.

The Board of Health can remove or cause to be removed to a proper place to be by them designated any person sick with any contagious, pestilential or infectious disease, and has "exclusive charge and control of the hospitals for the treatment of such cases," and power to provide and pay for the use of proper places to which to remove such persons, as well as to designate such places." Its hospitals, ambulances and boats with the attendant corps of physicians, inspectors and agents discharge this service. In addition it has a corps of vaccinators, and collects and distributes vaccine lymph or virus for vaccination in the

¹Id., § 575; N. Y. L., chap. 546, 1890; chap. 555, 1892; amending section 1290, N. Y. Cons. Act.

city.' Any citizen complaining or complained of, under any of these specified heads mentioned and provided for in the law, sets this machinery in operation under one of the enumerated powers, and arrives with no unnecessary delay at a judgment,¹ whether of the department or the courts, which conserves the rights of the public as well as the individual, and is directed to the peace, quiet and safety of the community at large.

¹ N. Y. Cons. Act, §§ 549, 553, 554.

² Chap. 74, 1866, §§ 16, 30; N. Y. Cons. Act, §§ 636, 639, 646-648, 535.

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